MAR 27 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 462

WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
Petitioner,

v.

FEDERAL POWER COMMISSION, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT PACIFIC NORTHWEST POWER COMPANY

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INDEX

	Page
BRIEF FOR RESPONDENT PACIFIC NORTHWEST POWER COMPANY	1
Questions Presented	1
Statement	2
1. Events prior to Pacific Northwest's application for preliminary permit	6
2. Pacific Northwest's application for a permit	8
3. The first license proceeding	11
4. The High Mountain Sheep-Nez Perce license proceeding	13
5. The Commission's decision	16
Argument	21
Introduction and Summary	21
I. Pacific Northwest's Preliminary Permit Covered High Mountain Sheep	25
A. The permits contemplated by the Act are permits covering mutually exclusive facilities that would develop essentially the same water resources; limiting permits to facilities described in advance of investigations thereunder would frustrate the intent of the Congress	28
B. Pacific Northwest's permit was the type of permit contemplated by the Act and accordingly covered High Mountain Sheep	37
II. The Commission's Interpretation of the Permit is Wholly Consistent with the Notice Provisions of Section 4(f) of the Act	47
III. The Preliminary Permit was Still in Force When Pacific Northwest Applied For Its License	55
A. The denial of Pacific Northwest's first license application within the three-year term of the preliminary permit did not terminate the permit	56

Page

B. Pacific Northwest submitted a complete license application for High Mountain Sheep within the three-year term of its permit 61
Conclusion 69
Appendix 71

CITATIONS

Cases:

The Charles River Bridge v. *The Warren Bridge*, 36 U.S. (11 Pet.) 420 44
Chicago, St. P., M. & O. R. Co. v. *United States*, 322 U.S. 1 ..... 45, 53
Civil Aeronautics Board v. *State Airlines*, 338 U.S. 572 ..... 45, 53
Empire District Electric Co., 1 F.P.C. 15 (1932) 66
Federal Power Commission v. *Niagara Mohawk Power Corp.*, 347 U.S. 239 ..... 22, 29
Louisville Bridge Co. v. *United States*, 242 U.S. 409 43
The Montana Power Co., 17 F.P.C. 834 (1957) 33, 43, 52
Pacific Northwest Power Co., 19 F.P.C. 127 (1958) 13
Tacoma v. *Taxpayers*, 357 U.S. 320 61
United States v. *Grand River Dam Authority*, 363 U.S. 229 44
United States v. *Union Pacific R. Co.*, 353 U.S. 112 44
Washington Pub. Pow. Sup. Sys. v. *Pacific Northwest Pow. Co.*, 217 F. Supp. 481 (D. Ore. 1963) 20

Statutes and Regulations:

Federal Water Power Act:

Section 4(f), 16 U.S.C. 797(f) ..... passim
Section 5, 16 U.S.C. 798 ..... passim
Section 7(a), 16 U.S.C. 800(a) 17, 27, 33, 34
Section 9, 16 U.S.C. 802 ..... 20, 26, 63, 66

Page

Section 10(a), 16 U.S.C. 803(a) ..... passim
Section 21, 16 U.S.C. 814 41
Section 24, 16 U.S.C. 818 ..... 20, 40, 41

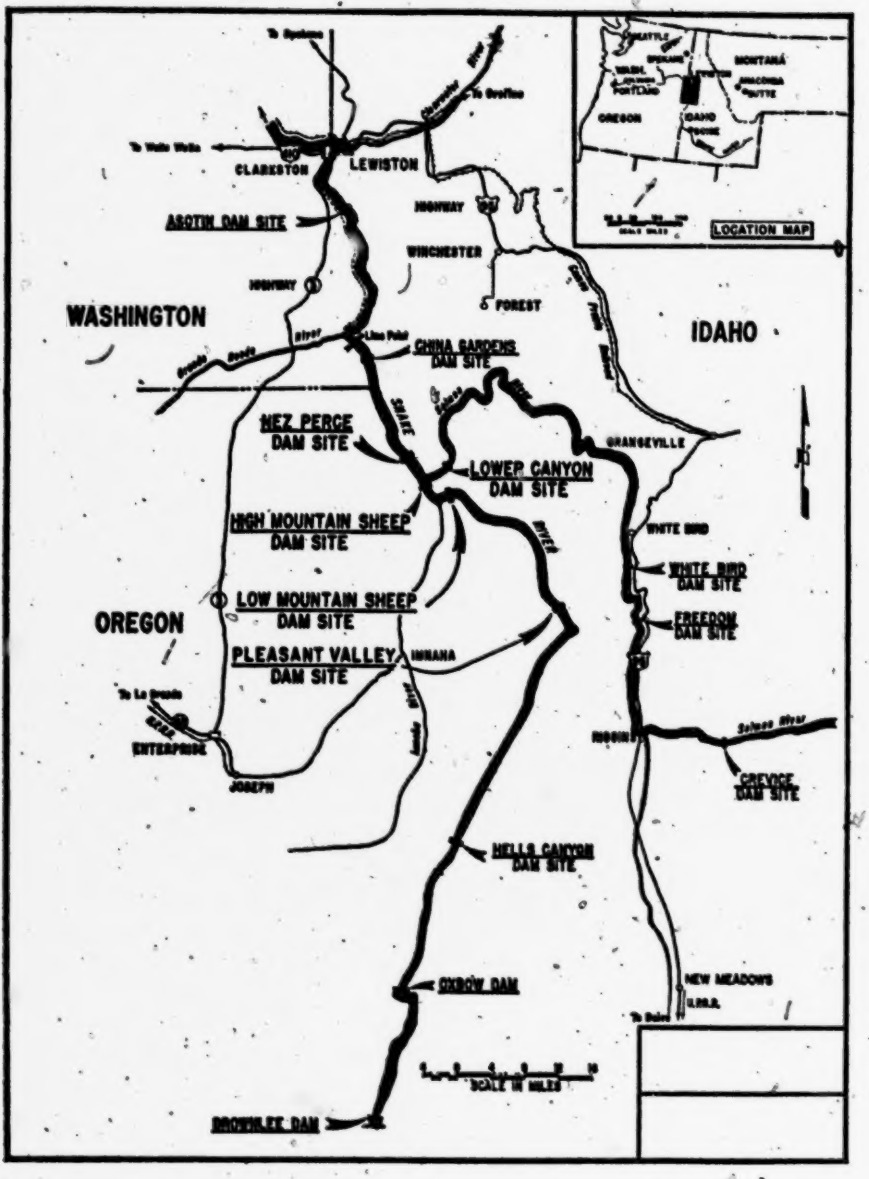
18 C.F.R.:

Section 1.14 62
Section 1.29 62
Section 4.31 ..... 63, 65
Section 4.40 63
Section 4.41 ..... 63, 66
Section 4.81 62
Section 4.82 ..... 9, 20, 40
Section 4.84 33

Idaho Code § 61-327 21

Miscellaneous:

F.P.C., First Annual Report (1921) 42
F.P.C., Third Annual Report (1923) 58
Hearings before the House Select Committee on Water Power, 65th Cong., 2d Sess. 29, 34, 35
Hearings before the House Committee on Public Lands on H.R. 16673, 63d Cong., 2d Sess. 31
Hearings before the National Waterways Commission, S. Doc. No. 274, 62d Cong., 2d Sess. 31
Hearings Before the Senate Committee on Public Lands on H.R. 16673, 63d Cong., 3d Sess. 30, 31
H.R. Doc. No. 403, 87th Cong., 2d Sess. 15
H.R. Doc. No. 531, 81st Cong., 2d Sess. 7
H. Rep. No. 715, 65th Cong., 2d Sess. 29
Interim Report No. 4, *Columbia River and its Tributaries, Mountain Sheep,* District Engineer, 1947 7
S. Doc. No. 51, 84th Cong., 1st Sess. 6, 8, 9, 10
56 Cong. Rec. 9113 35
56 Cong. Rec. 9762-9763 ..... 48, 49, 50


LOCATION MAP
CLARKSTON
LEWISTON
ASOTIN DAM SITE
WINCHESTER
FOREST
WASHINGTON
IDAHO
CHINA GARDENS DAM SITE
NEZ PERCE DAM SITE
LOWER CANYON DAM SITE
HIGH MOUNTAIN SHEEP DAM SITE
LOW MOUNTAIN SHEEP DAM SITE
PLEASANT VALLEY DAM SITE
OREGON
ENTERPRISE
JOSEPH
GRANGEVILLE
WHITE BIRD
WHITE BIRD DAM SITE
FREEDOM DAM SITE
GRIEVOE DAM SITE
HELLS CANYON DAM SITE
OXBOW DAM
NEW MEADOWS
BROWNLEE DAM
SCALE IN MILES

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BRIEF FOR RESPONDENT PACIFIC NORTHWEST POWER COMPANY

Questions Presented

1. Whether a preliminary permit issued to respondent Pacific Northwest Power Company under Sections 4(f) and 5 of the Federal Water Power Act (16 U.S.C. 797(f), 798), to enable Pacific Northwest to make the studies necessary to apply for a license to construct and operate a project "best adapted" to comprehensive development of

the Middle Snake River, and in the meantime to maintain Pacific Northwest's "priority of application" for the license, covered the hydroelectric project (High Mountain Sheep) which the Commission determined was the project "best adapted" to comprehensive development of the waterway.

2. If the permit did cover the High Mountain Sheep project, whether Pacific Northwest is nonetheless not entitled to a priority on the ground that petitioner Washington Public Power Supply System was deprived of notice.

3. Whether the preliminary permit was still in effect when Pacific Northwest applied for a license to construct and operate the High Mountain Sheep project.

Statement

Petitioner Washington Public Power Supply System (the "Supply System") seeks to have this Court set aside an order by the Federal Power Commission, affirmed by the Court of Appeals, licensing respondent Pacific Northwest Power Company ("Pacific Northwest") to construct and operate a hydroelectric project on the Snake River between Oregon and Idaho just above the point at which the Salmon River flows into the Snake. The controversy between Pacific Northwest and the Supply System and its predecessors has lasted for over a decade, beginning in 1954 when Pacific Northwest sought and obtained a preliminary permit under Sections 4(f) and 5 of the Federal Water Power Act (16 U.S.C. 797(f), 798) to enable it to conduct geological, engineering and other investigations and studies necessary to devise a project which, in the words of Section 10(a) of the Act (16 U.S.C. 803(a)), "would be best adapted to a comprehensive plan for improving and developing" the stretch of the Snake from the Salmon River to Hells Canyon.

Throughout, Pacific Northwest has fought for a project located *above* the mouth of the Salmon in order to avoid destruction of the greatest remaining single natural spawning ground for spring chinook salmon in the Columbia River basin. Until the eleventh hour, the Supply System and its predecessors have opposed Pacific Northwest and have advocated construction of a dam *below* the mouth of the Salmon in the interest of greater power production. Until 1960, the Supply System and its predecessors did not even seek authority to build the dam *they* advocated—they hoped the federal government would do that. Now, however, after ten years, two hearings, and substantial expenditures by Pacific Northwest in the investigation and advocacy of a project above the Salmon, the Supply System, coolly conceding that it was wrong all along on the merits, asks this Court to rule that it has a preference for a license to build the project which is the fruit of Pacific Northwest's labors.

In outline the relevant facts—which we detail later—are as follows:

For years it has been recognized that a dam on the Snake River in the vicinity of its confluence with the Salmon River is necessary in order to develop the power resources of the Snake from that approximate location upstream about 60 miles to the hydroelectric facility at Hells Canyon. The principal controversy has been whether the dam on the Snake should be placed above or below the Salmon. From the time that serious study of the problem got underway, every interested governmental agency and conservation group advocated positioning the dam above the Salmon so that the important fish resources of that river would not be impaired. On the other hand, certain public power organizations, the predecessors in interest of the Supply System

in these proceedings, urged that a dam below the Salmon would produce overriding power benefits.

In 1954 Pacific Northwest applied to the Commission for a preliminary permit so that it could explore the matter thoroughly. Since the most recent governmental study had indicated the desirability of a two-dam facility, located above the Imnaha, a small tributary of the Snake that flows into the Snake just above the Salmon, Pacific Northwest described that type of project in its application.

The predecessors in interest of the Supply System opposed Pacific Northwest's application on the ground that the dam should be located below the Salmon, but the permit was granted. While the permit described the two-dam facility, it also required Pacific Northwest to conduct a thorough investigation, in consultation with interested governmental agencies, so that the project ultimately licensed would be that best adapted to development of this portion of the river.

Thereafter Pacific Northwest investigated various possible sites for the project. It determined that the damage to fish migration that might be produced by a facility below the Salmon was a very serious problem indeed, and that countervailing advantages in terms of power and storage would not justify construction at such a site. In addition, as among the possible sites above the Salmon, Pacific Northwest was moved by the conviction of conservation groups that the fish resources of the Imnaha also deserved protection. Since Pacific Northwest's geological investigation demonstrated that a single high dam could not be constructed at Mountain Sheep above the Imnaha, Pacific Northwest concluded that a two-dam facility similar to that which it had tentatively described in its permit application would be best adapted to development of the resource. Therefore, five months after obtaining its permit, it applied for a license for a two-dam project above the Imnaha.

However, the Commission denied the license on the ground that a location below the Salmon was preferable. The Commission believed that the fish problem probably could be solved and in any event concluded that the power advantages of a downstream facility were decisive.

The three-year period of the permit not having expired, Pacific Northwest tried again. It did not, however, take the easy course of adapting its views to the Commission's. Its investigations convinced it that the fish problem on the Salmon could not be solved effectively, and, on the other hand, that a single high dam could be built at a site on the Snake above the Salmon but below the Imnaha—"High Mountain Sheep." Accordingly, Pacific Northwest applied for a license for a High Mountain Sheep project.

The predecessors in interest of the Supply System continued their opposition, advocating federal construction below the mouth of the Salmon, at Nez Perce. Then two years later, the Supply System applied for a license for Nez Perce. Since the two sites were mutually exclusive, a lengthy comparative hearing was held. After the bulk of the evidence was in, the Supply System finally appreciated the force of Pacific Northwest's case for High Mountain Sheep and filed an alternative license application for that project, asserting that it had a preference as a public body.

The Commission awarded a license for a High Mountain Sheep project to Pacific Northwest. It concluded that Pacific Northwest had been right in advocating construction above the Salmon—that probable damage to fish outweighed any benefits Nez Perce might offer. It thus reversed the view it had taken in rejecting Pacific Northwest's prior two-dam application and commended Pacific Northwest for adhering to its convictions. The Commission rejected the Supply System's claim that it should be preferred for High Mountain Sheep, holding that Pacific Northwest had priority because of its preliminary permit. The Commission con-

strued the permit as covering alternative projects designed to develop substantially the same portion of the river upstream to Hells Canyon, and thus as covering not only the project provisionally described therein but also High Mountain Sheep. The Commission also rejected the Supply System's claim that Pacific Northwest's permit had expired before Pacific Northwest applied for a license.

The Supply System has not asked this Court to review the Commission's conclusion that the Supply System was wrong and Pacific Northwest was right on the issue that for years had divided them—whether the dam should be placed above or below the Salmon. Rather, the Supply System maintains that it should have been authorized to construct the facility it had so long opposed.

In detail, the facts are these:

1. *Events prior to Pacific Northwest's application for preliminary permit.* This controversy concerns the development of the "Middle Snake River," the portion of the Snake River that flows along the boundary between Idaho and Oregon from the Snake's confluence with the Salmon River about 60 miles upstream to the site of the Hells Canyon hydroelectric facility. Clustered together near the mouth of the Salmon are several potential locations for dams. Some of the locations, downstream from the Salmon, are called, collectively, Nez Perce. The other locations, above the Salmon, are called Mountain Sheep. Some of the Mountain Sheep locations are below and some are above the Imnaha, a small stream that flows into the Snake a few miles upstream from the Salmon. (See S. Doc. No. 51, 84th Cong., 1st Sess.)

Comprehensive development of the Snake River basin ultimately requires construction of a dam somewhere in the vicinity of the junction of the Snake and the Salmon. The principal issue with respect to location has been whether

the dam should be above or below the Salmon. That issue has turned on the relative importance attached to conflicting interests in power production and fish conservation. A dam located at Nez Perce, below the mouth of the Salmon and damming both the Salmon and the Snake, would produce more power than would a project above the Salmon. But the Salmon is the greatest remaining spawning ground for spring chinook salmon in the Columbia River system, and existing techniques of fish passage are such that these fish probably would be destroyed if a high dam blocked their route of migration (II R. 629-640).

The controversy which has culminated in the case now before this Court began with a series of reports by federal agencies which dealt with the question whether construction of a project developing the Middle Snake should be above or below the Salmon. Those reports all recommended development above the Salmon to avoid obstruction of fish migration to and from the Salmon. The first report so recommending, in 1947, was by the District Engineer, U. S. Corps of Engineers. (Interim Report No. 4, *Columbia River and its Tributaries, Mountain Sheep,* District Engineer, 1947). The next such report—a massive report in 1948 by the Corps of Engineers setting forth the first comprehensive plan for the development of the Columbia River basin—indicated that greater power benefits could be obtained by development at Nez Perce but that such a project could not be recommended until a way was found to protect the Salmon River fishery. That report concluded that if the fish passage problem had not been solved when the time came for construction, Mountain Sheep should be given precedence—*i.e.*, that the conservation values of fish should prevail over the dollar values of power. (H. R. Doc. No. 531, 81st Cong., 2d Sess.)

Next, in 1952, the Senate Committee on Commerce requested the Corps of Engineers to review its 1948 report.

The resulting report—a joint effort by the Corps and the Bureau of Reclamation—again examined Nez Perce, again concluded that the interest of conservation militated against it, and again recommended the Mountain Sheep alternative. (S. Doc. No. 51, 84th Cong., 1st Sess., pp. 33, 165.) In the course of their investigation, the Corps and the Bureau held public hearings concerning the development of the Middle Snake, at which point the Northwest Public Power Association, one of the Supply System's predecessors in interest in these proceedings,[1] appeared on the scene. On December 1, 1953, in a written statement submitted for inclusion in the record of the hearings, the Association flatly opposed Mountain Sheep and supported Nez Perce. (S. Doc. No. 51, 84th Cong., 1st Sess., Part I, Appendix F, pp. 242-243.) However, there was nothing to indicate the monumental proportions of the controversy which was to follow.

2. *Pacific Northwest's application for a permit.* At this point, in November 1954, Pacific Northwest applied for a preliminary permit under Sections 4(f) and 5 of the Federal Power Act (16 U.S.C. 797(f), 798) to enable it to conduct investigations necessary to determine what precise projects would be best adapted to a comprehensive plan for improving and developing the Snake from the Salmon to Hells Canyon, and in the meantime to maintain priority of application for a license to construct such projects when the best development plan finally had been determined (I R. 141-150).

Power Commission regulations required Pacific North-

[1] The Supply System, a municipal corporation organized under the laws of the State of Washington, was not created until 1957 (II R. 610). It has characterized itself as a successor in interest in these proceedings to the Northwest Public Power Association and the Hells Canyon Association (I R. 201; II R. 718, 792). It is a "successor in interest" to those associations of public power advocates only in the sense that it, too, advocates public power and advocated Nez Perce in preference to High Mountain Sheep (I R. 2-4).

west to describe provisionally the project which at the time seemed the most probable development of the resources involved (II R. 646-647; 18 C.F.R. 4.82). In this connection, the basic choice, of course, was whether interest in the conservation of fish or interest in power production should be deemed to be most important—*i.e.*, whether the project should be located above or below the Salmon, at Mountain Sheep or at Nez Perce. Pacific Northwest chose Mountain Sheep, and thus the battle line was drawn (I R. 149-150).

In addition, Mountain Sheep included at least three alternative plans of development, each of which would develop substantially the same head but which varied slightly in location and substantially in amount of storage. One alternative consisted of a high storage dam located between the Salmon and the Imnaha (the location now called "High Mountain Sheep"); but a dam at that location might destroy the Imnaha fishery. A second alternative consisted of a high storage dam located just above the Imnaha. A storage dam at that location would not interfere with the Imnaha fishery, but the previous governmental studies indicated that geological investigation might establish that such a project would not be feasible. (S. Doc. No. 51, 84th Cong., 1st Sess., p. 230.) The third alternative consisted of a regulating dam at a site just above the Imnaha and a high storage dam about 20 miles farther up the River at Pleasant Valley—the sort of project recommended by the Corps and the Bureau. The principal drawback to this possibility was that it would provide substantially less storage and consequently smaller power benefits. However, because the Snake is already well developed and has a great deal of storage, additional storage is of limited usefulness. Indeed, by 1985 that storage will be of comparatively little value for a variety of reasons, including, for example, increased steam generation (IV R. 349-350). Accordingly, conservation agencies, the Corps of Engineers, and the Bureau of

Reclamation all were of the view that protection of the Imnaha fishery was more important than the relatively short-term loss in storage entailed by the third, two-dam alternative. (See S. Doc. No. 51, 84th Cong., 1st Sess.)

In these circumstances, Pacific Northwest agreed that conservation interests should control. Therefore, in its application for a permit, Pacific Northwest provisionally described the project which at the time seemed most likely to be best adapted to comprehensive development of the waterway—the two-dam Mountain Sheep-Pleasant Valley alternative (I R. 143-144, 149-150).

Following the filing of the application, the Federal Power Commission published notice of Pacific Northwest's application in newspapers in the Oregon and Idaho counties in which the proposed project would be located (I R. 155; II R. 806-809) and also sent notice to the public utility commissions and governors of a number of states.[2] The Northwest Public Power Association informally protested the application, again advocating federal development at Nez Perce (II R. 792, 815). However, no public agency asserted a preference and applied for a permit and thus undertook to assume the burden and expense of the investigation required to plan a project which would be "best adapted to a comprehensive plan" for development of the Middle Snake (16 U.S.C. 803 (a)).

Accordingly, the Commission issued the preliminary permit sought by Pacific Northwest (I R. 151-164). The permit stated that the proposed project was "to be located on [the] Snake River . . . in Idaho County, Idaho, and Wallowa County, Oregon. . . ." It indicated further that "as described in the application, the proposed project would consist of

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[2] The Oregon and Idaho counties in which notice was published are not, of course, among the Washington municipalities which are constituents of Washington Public Power Supply System. The persons to whom such notice was sent are listed at pp. 30,008-30,009 of the Commission Record, Appendix, p. 71, *infra*.

two water-power developments designated as Mountain Sheep and Pleasant Valley," consisting of two dams, the lower 3.4 miles above the dam that eventually was licensed, with the two reservoirs extending back approximately 55 miles to the Hells Canyon dam site (I R. 151-152). In addition the permit provided that a license would be issued only for the project which, as required by Section 10(a) of the Act (16 U.S.C. 803(a)), would "be best adapted to a comprehensive plan for the development and utilization of the site for purposes of navigation, of water-power development, and for other beneficial public uses, including recreational purposes" (I R. 161); required Pacific Northwest to cooperate with various federal, state and other interested agencies to develop such a plan for the best development of the Snake (I R. 156-157); and provided that the "priority granted under the permit" would be lost if the permittee failed to "modify the plans as may be required by the Commission" if the project eventually proposed by the permittee in its license application "is not such as in the judgment of the Commission . . . will be best adapted to a comprehensive plan for the improvement and utilization of the site" (I R. 162-163).

3. *The first license proceeding.* Pursuant to its permit, Pacific Northwest undertook investigations necessary to devise a project best adapted to comprehensive development of the Middle Snake River. Its investigations and engineering prior to its first application for a license were not confined to the specific locations and structures provisionally described in the permit. Pacific Northwest considered but did not investigate possible projects below the Imnaha before filing its first license application because, in its judgment, necessary fish passage facilities had not been devised, and it agreed with the Corps and the Bureau that the public interest in proper protection of fish outweighed any mar-

ginal storage benefits any such project might provide. On the other hand, Pacific Northwest did investigate the geological feasibility of locating a high storage dam above the Imnaha at three different locations, and prepared plans, specifications and estimates for a structure of the approximate height of the dam eventually licensed for construction at High Mountain Sheep. However, the results of the geological studies precluded the construction of such a dam (1 R. 212-213; II R. 651). Accordingly, in September 1955, Pacific Northwest applied for a license for a two-dam development above the Imnaha. While the two dams for which a license was sought were to be located in the same vicinity as the dams provisionally described in the original permit application—at Mountain Sheep and Pleasant Valley—the height and exact location of the dams and the power installations had been modified in the light of Pacific Northwest's investigations and differed from those originally described in the permit (II R. 651).[3]

Thereafter, the Federal Power Commission held a hearing on Pacific Northwest's license application. The National Hells Canyon Association and the Northwest Public Power Association, the Supply System's predecessors in interest in these proceedings (I R. 201; II R. 718, 792), intervened to advocate federal construction of a high dam at Nez Perce (II R. 835, 851). It developed that the Federal Power Commission did not agree with Pacific Northwest, and for that matter with the Corps and the Bureau, as to

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[3] The Mountain Sheep dam specified in the license application was four-tenths of a mile upstream from the Mountain Sheep dam tentatively described in the permit application (I R. 212); the Mountain Sheep and Pleasant Valley dams specified in the license application were both 15 feet higher than the corresponding structures described in the permit application (I R. 151, 152; III R. 884, 898); and the license application specified installation of 1,002,000 kw of generating capacity, whereas the permit application had provisionally proposed a power installation of 850,000 kw capacity (I R. 152; III R. 887, 901).

the importance of the Imnaha and the Salmon and the fish resources of those rivers. The Commission was optimistic as to the possibility of developing effective fish passage facilities for high dams (II R. 848-850). Moreover, the Commission concluded that a high dam at Nez Perce would provide greater power and flood control benefits than would Mountain Sheep-Pleasant Valley. Accordingly, the Commission concluded that "Nez Perce is . . . superior" (II R. 842) and denied Pacific Northwest's application for a license. *Pacific Northwest Power Co.*, 19 F.P.C. 127 (1958) (II R. 833-854).

4. *The High Mountain Sheep-Nez Perce license proceeding.* Because a dam at one of the Mountain Sheep locations below the Imnaha but above the Salmon and Nez Perce—*i.e.*, at the site which Pacific Northwest eventually dubbed "High Mountain Sheep"—would interfere with fish migrating to and from the Imnaha, a fact which seemed to Pacific Northwest to justify the Mountain Sheep-Pleasant Valley alternative, the possibilities of development at "High Mountain Sheep" were not presented to the Commission during the hearing on the Pacific Northwest's first license application. However, while that application was pending before the Commission, Pacific Northwest undertook general site investigations and surveyed and designed a dam for the present High Mountain Sheep location (I R. 7-8). Therefore, by the time its first license application was denied, Pacific Northwest knew that as a part of a comprehensive development plan,[4] High Mountain Sheep would be superior to Nez Perce in potential flood control and power benefits. And more fundamentally, Pacific Northwest simply did not agree with the Commission's view as to the importance of the fish resources of the Salmon River and

[4] A project at Nez Perce would block both the Snake and the Salmon rivers. An alternative to the construction of a single storage dam at Nez

its notion that a high dam could be built at Nez Perce without destroying those resources. Consequently, on March 31, 1958, within the three-year term of its preliminary permit, Pacific Northwest again applied for a license—not to construct Nez Perce, which the Commission had said was "superior," but to construct High Mountain Sheep, which Pacific Northwest *knew* to be superior (I R. 165-200).

Up to the time of the Commission's decision rejecting Pacific Northwest's first license application, conservation agencies had paid little attention to the proceedings. Now, when Pacific Northwest continued its fight to obtain approval for a project above the Salmon, public and private conservation agencies rallied in support. The Oregon Wildlife Federation, the Idaho Wildlife Federation, the Washington State Sportsmen's Council, and the state fish and game agencies of the states of Oregon, Washington and Idaho endorsed Pacific Northwest's efforts (II R. 323-324). Moreover, labor, trades councils and similar organizations endorsed and supported Pacific Northwest's efforts on behalf of the conservation alternative.[5] Thus, the issue was again put to the Commission, framed squarely in terms of conservation.

In the meantime, the Corps of Engineers had undertaken a further review of the 1948 and 1954 reports. The resulting report was released in the fall of 1958, and was then

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Perce is construction of storage dams on both the Snake and the Salmon just above their junction—at "High Mountain Sheep" on the Snake and at one of the "Lower Canyon" sites on the Salmon. This alternative development plan potentially would provide greater flood control and power benefits than would a single dam at Nez Perce. At the same time, by deferring the actual construction of the Lower Canyon dam on the Salmon indefinitely, until the fish passage problem really *is* solved, damage to the Salmon River fishery can be avoided (II R. 640).

[5] *E.g.*, Pasco, Washington, "Columbia Basin News," June 5, 1960; Eugene, Oregon, "Register-Guard," Dec. 9, 1960; see also Pasco, Washington, "Columbia Basin News," June 18, 1964; Spokane, Washington, "Spokesman-Review," Mar. 19, Apr. 5, June 10, June 21, 1964; Boise, Idaho, "Idaho Daily Statesman," Apr. 13, 1964.

reviewed and approved by the Board of Rivers and Harbors in the spring of 1959. After an exhaustive analysis of the competing Mountain Sheep and Nez Perce alternatives, and the relevant conservation issues, the new report concluded unequivocally that Mountain Sheep was the proper project to build. (H. R. Doc. No. 403, 87th Cong., 2d Sess.; IV R. 320.) At this point, the case was ready to present again to the Federal Power commission.

Once more, the Northwest Public Power Association and the Hells Canyon Association intervened, objected to High Mountain Sheep on the same grounds asserted against Mountain Sheep-Pleasant Valley, and urged federal construction at Nez Perce (II R. 323, 792-793). From March 1958, when Pacific Northwest filed its High Mountain Sheep application, through March 1960, neither the Supply System nor its predecessors evidenced any interest in obtaining any license. By 1960, however, the proponents of Nez Perce apparently concluded that their arguments would receive a better reception if they were presented by an actual applicant for a license (IV R. 5). Accordingly, in March 1960, only five days before the beginning of the scheduled hearing on Pacific Northwest's new license application, the Supply System filed an application for a license to construct Nez Perce (I R. 247-254). Its counsel and witnesses stated that its "one and only" purpose was to promote Nez Perce, which it deemed the preferable project (I R. 2-4; II R. 329-330, 792-793; IV R. 1-6), and its managing director testified during the subsequent hearings that had Pacific Northwest sought a license for Nez Perce instead of High Mountain Sheep, the Supply System would not itself have applied for a license (II R. 330, 793).

Thus, Pacific Northwest and the Supply System presented to the Commission two cleancut alternatives: whether the dam should be above or below the Salmon—*i.e.*, whether fish or power should prevail. Proceedings on the two con-

flicting applications were consolidated by the Commission (I R. 258), and Pacific Northwest and the Supply System undertook the trial of one of the longest license proceedings in the history of the Commission.

The hearings commenced in November 1960 and eventually concluded in September 1961, Pacific Northwest making its case for High Mountain Sheep, the Supply System making its case for Nez Perce. As the evidence accumulated, it became abundantly clear that the case for a dam above the Salmon could not be rebutted and would, in due course, prevail. Consequently, at the conclusion of the testimony, just prior to the commencement of the parties' rebuttal cases, the Supply System announced that it had filed an amended application demanding, as an alternative to a license for Nez Perce, that it be granted a license to construct High Mountain Sheep (I R. 284-288). Thus, in 1961, eight years after their first public statements advocating Nez Perce and opposing a project above the Salmon, seven years after Pacific Northwest had applied for a preliminary permit, and after the completion of each party's principal case, the public power interests virtually gave up the fight they had waged against Pacific Northwest for so long and demanded instead that they be licensed to build Pacific Northwest's project.

5. *The Commission's decision.* On February 5, 1964, the Commission issued its Opinion and Order deciding the case (II R. 609-716). That decision conclusively settled the issue over which Pacific Northwest and the advocates of public power had fought for nearly a decade. The decision—unanimous on this issue—was that Pacific Northwest was right, the Supply System wrong; development should be above the Salmon rather than at Nez Perce (II R. 640). The Commission found that its earlier decision that Nez Perce was the "best adapted" plan was unjustified, be-

cause Nez Perce would jeopardize the anadromous fish resources of the Salmon River. "As a matter of fact," the Commission observed, Pacific Northwest "is to be commended for sticking with its concept regarding proper development of the Snake. With the issuance of the Commission's Opinion . . . indicating its conclusion that Nez Perce represented the best development of this reach of the Snake, it would have been an easy matter for [Pacific Northwest] to have promptly filed a license application specifying this site. This it did not do. Rather, it insisted that any proposal which would block the Salmon River was not best adapted to comprehensive development . . . [W]e are . . . constrained to observe the irony involved in rejecting [Pacific Northwest's] proposal to develop the Snake when its [High Mountain Sheep] application would promptly have been granted had the Commission properly analyzed the relative merits of a Nez Perce project" (II R. 653). That settled the issue which had been fought so hard for so long.

Accordingly, there remained only the question whether the Supply System should be permitted to succeed in its belated attempt to appropriate Pacific Northwest's project. Under Section 7(a) of the Act (16 U.S.C. 800(a)), the Commission is required to give preference to license applications by states and municipalities "where no preliminary permit has been issued," if the public agency's plans can "be made equally well adapted" and the agency otherwise qualifies for the statutory preference. On the other hand, when a preliminary permit has been issued, those provisions of Section 7(a) do not apply and instead the permittee has a statutory priority to a license under Section 5 of the Act (16 U.S.C. 798). Accordingly, the Commission stated, "[a]s between the applicants, the initial question is . . . whether [Pacific Northwest] has a priority under its preliminary permit" (II R. 641).

The Supply System claimed that High Mountain Sheep was not within the geographical scope of the permit and thus that Pacific Northwest did not have priority. A majority of the Commission rejected that claim. Turning first to the statute, the Commission noted that preliminary permits are issued, under Sections 4(f) and 5 of the Act, to enable prospective license applicants to make the studies necessary to prepare an application for a license—which under Section 10 of the Act can only be issued for a project which is "best adapted" to comprehensive development of the resources involved—and at the same time to maintain the permittee's "priority of application" for the license. Thus, the statute "clearly contemplates that proposals and plans made at the time the permit was issued may be changed as a result of investigations made by the permittee. . . . [T]he permittee is protected by the permit from rival applicants while incurring expenses in the investigation of a project intended and required by Section 10(a) to be best adapted to a comprehensive development of the reach of the river involved" (II R. 643).

Consequently, the Commission concluded that the purpose of the statutory provisions was "to give a permittee the first right to develop that reach of a river to which the permit relates." A contrary interpretation "would make the permit meaningless, for if another party could obtain a permit or apply for a license for a nearby project that would develop substantially the same head as the one described in the original permit, there would be no protection to the first permittee." Such a result—"[t]o interpret the priority afforded by a permit as limited to a single project"—would "be contrary to the two most significant objectives of the Act": "to encourage the development of our nation's water resources, and to insure that such development would be best adapted to the fullest use of the river. . . ." Potential

developers would be unlikely to "be willing to undertake substantial and expensive investigations" if a permit were good only in "the unlikely event . . . that the results of the investigations coincided precisely" with the permittee's advance guess as to the best development of the river; indeed, in the Commission's experience, no project had ever been constructed "at the same exact site and in the same fashion as originally contemplated." And "[i]f priority extended only to that project described in a permit, the pressure would be great upon the permittee not to explore fully alternative projects which might be superior." If such investigations showed an alternative development to be preferable, "the first permittee would be in danger of losing its opportunity to develop needed generating capacity as a result of its own actions." In short, the Commission concluded, "a narrow interpretation of the priority provisions would serve to undermine the objective of Section 10(a) of the Act which is designed to insure the optimum development of our water resources" (II R. 643-645).

The Commission then analyzed the terms of Pacific Northwest's permit and concluded that it was intended to be the "type of permit contemplated by the Act" and should be so construed (II R. 646). In this connection it noted that the permit contained six different articles "which required [Pacific Northwest] to cooperate with various federal, state and other interested agencies for the purpose of evolving the best development of the Snake, irrespective of the detailed description of the project as tentatively proposed" (II R. 646). In these circumstances, the Commission observed, "[t]o adopt a narrow interpretation of the permit would be anomalous in that [Pacific Northwest] would be required to develop the best plan of development when it would thereby lose its priority to carry out the development" (II R. 646). To be sure, the permit set forth the

"tentative" boundaries of the project provisionally proposed in the permit application as required by the Commission's regulations.[6] But the Commission's regulations required such a description, not for the purpose of limiting the geographical scope of the permit, but for the quite different purpose of insuring "a sensible program of land withdrawals" under Section 24 of the Act (II R. 646-648).

In consequence, the Commission construed Pacific Northwest's permit as covering not only the specific two-dam project provisionally described in the original application but also alternatives, including High Mountain Sheep, for developing substantially the same head and essentially the same reach of the river (II R. 643). The Commission also rejected the Supply System's contention that it somehow had been deprived of notice (II R. 654; see also II R. 792-793), and the Supply System's further contention that Pacific Northwest's permit had expired before Pacific Northwest applied for its license (II R. 650-653; see also II R. 787-788).[7] Accordingly, the Commission concluded that

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[6] 18 C.F.R. 4.82(k), Exhibits H and I.

[7] In addition, the Commission found that "the plans of [Pacific Northwest] to develop the [High Mountain Sheep] site are best adapted to conserve and utilize in the public interest the water resources of the region" (II R. 672); that there were no material differences in construction features and cost as between the two applicants' plans (II R. 641); and that the Supply System had failed, on the existing record, to demonstrate that it was qualified for a license (II R. 655-657)—although it had had at least a year and a half, from the time it applied for a license to the conclusion of the hearing, in which to do so. Its failure to show it could qualify for a license consisted of failing to show that it needed the additional generating capacity (II R. 655), that it would be able financially to carry out its plans (II R. 655), and that it had legal capacity to carry out the project (II R. 655-657). The Commission noted that *Washington Pub. Pow. Sup. Sys.* v. *Pacific Northwest Pow. Co.*, 217 F. Supp. 481 (D. Ore. 1963) (appeal pending), had held that the Supply System lacked authority under the law of its own state of Washington to develop projects outside the state; and that, while § 9(b) of the Act requires a license applicant to demonstrate that it has "complied with requirements of the laws of the State or States within which the proposed project is to be located . . . with

Pacific Northwest's license application was entitled to the statutory priority and thus that the Supply System was not entitled to assert a preference, and granted the license sought by Pacific Northwest (II R. 672-673). On rehearing, the Commission reaffirmed its conclusions regarding these matters (II R. 780, 787-795).

On appeal, the Court of Appeals affirmed (IV R. 372-385). The Supply System now seeks to have this Court overturn the Court of Appeals' decision and enforce its alleged "preference right to a license" (Br. p. 65) to build Pacific Northwest's project. We show below that the Supply System is entitled to no relief.

Argument

Introduction and Summary

The Supply System now concedes that Pacific Northwest was right and the Supply System was wrong with respect to the issue which was fought for so many years—whether facilities developing the Middle Snake should be located above or below the mouth of the Salmon River. The Supply System claims, however, that it should be accorded a preference to build the project which Pacific Northwest planned and proved to be best adapted to a comprehensive plan for the development of the Snake. It attacks the decisions of the Commission and the Court of Appeals, rejecting that claim, on three grounds: (1) that High Mountain Sheep was not within the geographical scope of Pacific Northwest's preliminary permit; (2) that even if it was, the Supply System did not receive adequate notice; and (3) that the permit had expired when Pacific

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respect to the right to engage in the business" in which it proposes to engage, both the Idaho and Oregon Utility Commissions had objected to the licensing of the Supply System because it had failed to comply with those states' laws, and moreover, under Idaho Code § 61-327, the Supply System would be unable to acquire property in Idaho needed for the project (II R. 656-657).

Northwest applied for its High Mountain Sheep license. In this brief we show that the Supply System's contentions are not well-founded for the following reasons[7a]:

1. The Commission was right in concluding that the type of permit contemplated by the Act is a permit covering mutually exclusive facilities for the development of essentially the same water resources, that the permit issued to Pacific Northwest was such a permit, and that the permit therefore covered not only the facilities provisionally described therein, but also alternative facilities, such as High Mountain Sheep, which likewise would develop the Middle Snake. The Act was intended, among other things, to encourage the comprehensive development of the nation's navigable waterways by private parties. 16 U.S.C. 803(a); *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 US 239, 251 (1954). Because the investigation and planning of facilities that will be "best adapted" to such development, a necessary preliminary to an application for a license under Section 10(a) of the Act (16 U.S.C. 803(a)), frequently require a substantial investment which prospective developers would not be likely to make in the absence of protection against unfair appropriation by others, the Congress authorized the Commission to issue preliminary permits to protect such investments. Such permits would provide no protection and thus would not serve their intended purpose if they were limited in coverage to facilities described in advance of the contemplated preliminary investigation and did not cover alternative facilities developed through such investigation. Numerous provisions in the permit issued to Pacific Northwest demonstrate beyond doubt that the permit was not so limited

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[7a] We note also that even if the Supply System were right in these contentions as to Pacific Northwest's priority, it would not be entitled to the order it seeks—an order that the Commission give effect to its alleged "preference right to a license" (Br. p. 65)—because it has never demonstrated that it can qualify for the statutory preference for a license. See II R. 655-657; p. 20 n. 7, *supra*.

—that on the contrary it was intended to cover mutually exclusive facilities such as High Mountain Sheep, eventually determined to be "best adapted," and thus was the type of permit contemplated by the Act.

According the permit its intended scope in no way impinges upon the statutory preference accorded public nonfederal developers, for the Act and its legislative history demonstrate that in order to accomplish both the relevant purposes of the Congress—to encourage investment of nonfederal capital and to give public agencies a preference—the Congress determined that preference agencies must assert their preference when a permit is sought and thus assume the expense of the preliminary investigation and planning. In fact, the protection afforded by preliminary permits for the preliminary investment is fully as important to preference agencies as to private companies, for were it not for that protection, the preliminary investment of a public agency could be jeopardized by competing license applications by other public agencies.

2. The Supply System claims that even if Pacific Northwest's permit did cover High Mountain Sheep, the permit cannot defeat the Supply System's asserted right to a preference because the Commission's notice of the permit application did not give the Supply System adequate notice that the time had come to assert its preference and thus to assume the expense of locating and planning "best adapted" facilities if it wished to develop the Middle Snake. That claim is insupportable. In the first place, the Congress did not intend that permits should be subject to challenge on the ground that insufficient notice was given—it thought that matter should rest with the Commission. Moreover, the Supply System was not in existence when the questioned notice was given, and entities to which it claims to be a "successor" were rightly determined by the Commission not to be entitled to notice—they had never

expressed an interest in building a project themselves. In any event, the notice which the Commission gave *was* adequate. It informed public agencies that Pacific Northwest had applied for a permit with respect to facilities to develop the Middle Snake. Unless such agencies desired a free ride at Pacific Northwest's expense, they accordingly knew that the time had come to assert their preference for a permit and thus, as contemplated by the Act, to undertake the burden and expense of the investigations necessary to determine the proper location and nature of facilities which would be "best adapted" for such development. That is equally true whether such agencies thought that the sites tentatively proposed by Pacific Northwest would be "best adapted" or believed instead that facilities at mutually exclusive sites would be better.

The groundless character of the Supply System's assertion that public agencies cannot know from the Commission's notice how far a permit extends is illustrated by the facts of this case. Certain public agencies, alleged predecessors in interest of the Supply System, knew perfectly well that Mountain Sheep-Pleasant Valley, High Mountain Sheep and Nez Perce were mutually exclusive and fought Pacific Northwest throughout because they desired to have the federal government build facilities at Nez Perce. Only when they realized that the federal government would not undertake such development did the Supply System apply for a license, long after Pacific Northwest had made its preliminary investment under its permit, and even then its managing director testified that if Pacific Northwest had sought a license for Nez Perce instead of High Mountain Sheep the Supply System would not itself have applied for a license.

3. The claim that the priority afforded by Pacific Northwest's permit had terminated by the time Pacific Northwest applied for its High Mountain Sheep license is equally in-

supportable. The permit was issued for a stated term of three years, and Pacific Northwest submitted its license application for High Mountain Sheep within that three-year term. Contrary to the Supply System's assertions, the denial of Pacific Northwest's Mountain Sheep-Pleasant Valley license application did not terminate the priority before the expiration of the three-year term of the permit, because Section 5 of the Act and the permit itself specified the circumstances under which the priority would be lost, and denial of a license application was not among them. The 1923 opinion of the Commission's General Counsel, on which the Supply System relies, concerns the termination of priority *after* expiration of the term of a permit, not before. The further assertion that Pacific Northwest's license application was incomplete was rightly rejected by the Commission as unmeritorious and untimely. The application complied with the Commission's regulations in all respects. And the contention that Pacific Northwest did not complete the investigations contemplated by the Act until 18 months after the expiration of the three-year term of the permit was not raised by the Supply System prior to the Commission's decision, long after the record was closed. Consequently, the relevant activities of Pacific Northwest during the three-year term were not fully developed in the record, and the Supply System's contentions on that score should not be considered now. Moreover, the evidence that is in the record is wholly opposed to the Supply System's contentions.

We deal with each of these matters in detail below.

I. Pacific Northwest's Preliminary Permit Covered High Mountain Sheep.

The Supply System claims that Pacific Northwest's preliminary permit was limited in geographical scope by the tentative description of the project facilities described in

the permit. The Commission rejected that contention and held that, in view of the statutory purposes of the permit and the specific provisions in it, the permit covered mutually exclusive alternatives for developing essentially the same water resources and thus covered High Mountain Sheep. See pp. 17-20, *supra*. Whether the Supply System or the Commission is right with respect to that issue is the major question before this Court..

At the outset, it should be noted that it is agreed by all concerned that the Federal Water Power Act authorized the Commission to issue permits of the kind which the Commission construed Pacific Northwest's permit to be—that is, a permit covering mutually exclusive sites for facilities developing essentially the same water resources. After reviewing Sections 4(f), 5, 9 and 10(a) of the Act (16 U.S.C. 797(f), 798, 802, 803(a)), the Commission's majority concluded that such a permit is the "type of permit contemplated by the Act" (II R. 645-646). The dissenting Commissioners, who agreed with the majority that an applicant should not be required to guess in advance of exploratory studies just what project eventually will turn out to be best —an "impossible demand" (II R. 699)—were of the view that permits covering mutually exclusive facilities may be issued (II R. 708). The Court of Appeals determined that the Commission's decision was consistent with the statutory purpose "to afford protection to the entrepreneur willing to invest his time and money in determining exactly where and in what form to propose construction of a project which will be best adapted to a comprehensive plan for improving or developing a waterway . . ." (IV R. 384). And in its brief, the Supply System agrees that an applicant might be granted a permit for the investigation of all sites in a disclosed reach of the river, when justified in the public interest (Br. p. 35). Thus, the case presents no

question as to the Commission's power to issue a permit like Pacific Northwest's, as the Commission construed it.

Moreover, apart from the question of notice (see pp. 47-55, *infra*), there is no dispute either that if the Commission did issue Pacific Northwest a permit that covered High Mountain Sheep, Pacific Northwest was entitled to a priority as against the Supply System. There is no controversy about the basic legislative framework established by the priority and preference provisions of the Act. Section 7(a) of the Act (16 U.S.C. 800(a)) requires the Commission to give preference to applications by states and municipalities for preliminary permits, and for licenses "where no preliminary permit has been issued," if the public agency's plans can "be made equally well adapted" and the agency otherwise is qualified. But where a preliminary permit has been issued, either to a preference applicant or to a private company such as Pacific Northwest, the mandatory preference provision of Section 7(a) no longer applies; under Sections 4(f), 5 and 10(a) of the Act (16 U.S.C. 797(f), 798, 803(a)), the preliminary permittee is required to find and plan a project which will be best adapted to the comprehensive multi-purpose development of the waterway, and in the meantime the permit gives him statutory "priority of application" for a license to construct the resulting project.

Thus, the question is whether the Commission properly interpreted its permit as having a scope appropriate to the statutory purpose it serves, or whether instead, as the Supply System claims, the permit should be construed like a deed, limited in scope to territory described in metes and bounds—*i.e.*, in a fashion that would frustrate the statutory purpose. For reasons set forth below, we submit that the Commission's construction was the only tenable construction of the permit.

A. *The permits contemplated by the Act are permits covering mutually exclusive facilities that would develop essentially the same water resources; limiting permits to facilities described in advance of investigations thereunder would frustrate the intent of the Congress.*

As the Commission and the Court below both observed, the fundamental purpose of the relevant provisions in the Act is to encourage the most comprehensive development of the nation's waterways by non-federal agencies, public and private. Accordingly, the Congress has authorized the Commission to issue preliminary permits to enable potential license applicants to conduct the expensive investigations necessary to determine the proper location and nature of facilities which are "best adapted" to such development, and at the same time to protect the permittee's investment in the preliminary investigations by maintaining his priority of application for a license to build and operate the resulting project. The Congress authorized the issuance of such permits because it concluded that investors—public or private—would not be likely to risk the substantial cost of investigation without the protection the permits provide. Since projects which ultimately are licensed as "best adapted" are never the same as those provisionally proposed in advance of investigation—indeed, since the purpose of preliminary permits is to enable permittees to *find* "best adapted" projects—limiting the scope of permits to facilities specified in advance of the necessary preliminary investigations would render permits useless and thus would defeat the statutory purposes such permits were intended to serve. Thus, the permits contemplated by the Act are permits covering mutually exclusive facilities which would develop essentially the same water resources. These conclusions are confirmed by the text of the Act and by its legislative history.

1. The fundamental purpose of the Act—to encourage optimal development of the nation's waterways by non-federal licensees—is apparent on the face of Section 10(a) of the Act (16 U.S.C. 803(a)). Section 10(a) authorizes the Power Commission to license non-federal developers to construct and operate water-power developments on navigable waters of the United States, and provides that all projects for which a license is issued "shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways. . . ." The Congress decided that in order to achieve comprehensive development, it was desirable to encourage investment of non-federal capital.[8] Thus, as this Court has observed, "the Act is one of reasonable regulation of the use of navigable waters, coupled with encouragement of their development as power projects by private parties." *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 251 (1954).

However, to secure a license to construct a project which will be "best adapted to a comprehensive plan for improving or developing a waterway," prospective licensees must first determine the proper location and nature of a project which will meet that statutory standard. Ordinarily, that entails extensive geological, engineering, and other studies of possible alternative facilities. Consequently, to be in position to file a license application, the prospective licensee frequently must make a substantial preliminary investment.[9] The Congress was advised that prospective licensees

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[8] See generally our brief in No. 463; H. Rep. No. 715, 65th Cong., 2d Sess. 15 (1918).

[9] *E.g.*, Testimony of C. F. Kelley of Montana Power Co., *Hearings Before the House Select Committee on Water Power*, 65th Cong., 2d Sess. 293 (hereinafter cited "House Hearings"):

> "For the information of some perhaps who may not have thoroughly considered the situation I beg to say that the determination of the matters that must be determined preliminarily to taking out a final license are not covered by the simple running of a transit line around

would not be likely to hazard the expense of such investigations if the product of their investment could then be stolen by "one who has done no work on the project but has had it brought to his attention through the efforts of the original pioneer."[10] Accordingly, the Congress was advised that to encourage investment of capital in the development of water resources, it would be necessary to provide protection for the investment made in such preliminary investigation and planning.[11]

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a proposed project; nor the establishment of a series of levels to determine the fall of the river; nor the measuring of the watershed, etc., to ascertain the probable volume of water. Ordinarily before an investment can be made which might jeopardize very considerable sums of money a great deal of work of a preliminary nature has to be done. The sinking of shafts for the purpose of ascertaining the character of the bed of the stream, borings for the purpose of ascertaining the geological conditions, and aggregate expenditures which might amount to several hundred thousand dollars may necessarily be made before definite decision as to the location, the character and kind of structure that should be built is made."

[10] Testimony of H. L. Cooper, *Hearings Before the Senate Committee on Public Lands on H.R. 16673,* 63d Cong., 3d Sess. 306 (1914).

[11] *E.g.,* Colloquy between E. C. Finney from the Department of the Interior and Senator Norris, *id.,* at pp. 14, 18:

"Mr. FINNEY. . . . The purpose [of the preliminary permit provision], of course, is to enable persons to get the data and to put them in position to decide whether or not they want to get a permanent lease or permit. Developers do not care to put their time and money into an enterprise until they make some preliminary investigation, and they do not want to make a preliminary investigation if there is a probability that that particular site will be given to somebody else. The purpose was to give a brief preliminary period in which a would-be developer can get up data and look into the proposition to see if he wishes to make an aplication. . . .

"Senator NORRIS. Why is it necessary that any permit should be given for the purpose of enabling applicants to obtain this data? Would it not be practicable for several persons to be obtaining the same data at the same time under the same power proposition? Is it necessary that a man should have an exclusive permit in order to gather this data?

"Mr. FINNEY. I am told that the investigation of possibilities of these sites involves surveys and various investigations, and the question of raising money and making other arrangements which are quite

The preliminary permit was the device the Congress fashioned to achieve that end.[12] In Section 4(f) of the Act (16 U.S.C. 797(f)), the Congress authorized the Commission "to issue preliminary permits for the purpose of enabling applicants for a license . . . . to secure the data and to perform the acts required" to apply for a license, and in Section 5 of the Act (16 U.S.C. 798) the Congress provided the necessary protection: "Each preliminary permit . . . . shall be for the sole purpose of maintaining priority of application for a license . . . for such period . . . not exceeding . . . three years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements." In short, the preliminary permit protects the permittee's investment by giving him "priority of application for a license" during the period required to make the investiga-

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expensive, and they would not be justified in going to that monetary expense, wasting their time, etc., investigating a property thoroughly with a view to developing it unless they had some assurance that at the end of the time, if they found it all right, they would get the permit."

See also testimony of Henry J. Pierce, President, Washington Irrigation & Development Co., House Hearings, 158: "No one would spend years of time and large sums of money in rounding up a water power project with the knowledge that he might never secure the right to develop it." See also statement of Senator Norris, *Hearings Before the Senate Committee on Public Lands on H.R. 16673*, 63d Cong., 3d Sess. 727 (1914): "The man who went ahead in a *bona fide* way and spent his money in examination and engineering . . . ought not to have any cloud upon his right to go ahead and finish." See also statement of Senator Clark, *id.* at 384: "When they have done certain definite acts and complied with certain rules and regulations . . . they [should] have some assurance that their application will receive favorable consideration."

[12] See footnote 11, *supra*. See also *Hearings Before the National Waterways Commission*, S. Doc. No. 274, 62d Cong., 2d Sess. 232-233 (1911); statement of O. C. Merrill (Chief Engineer, U.S. Forest Service), *Hearings Before the House Committee on Public Lands on H.R.* 16673, 63d Cong., 2d Sess. 373-374 (1914).

tions needed to determine the proper location and nature of a "best adapted" project—the only kind of project the Commission has authority to license. Thus, the preliminary permit is the first step in a statutory scheme, the end product of which is the licensing and construction of "best adapted" projects—*i.e.*, comprehensive nonfederal development of the nation's water resources.

2. Since the purpose of a permit is to enable a prospective licensee to locate and plan a "best adapted" project, limiting the scope of the permit to facilities described in advance of investigations thereunder would thwart the purpose the Congress intended the permit to serve. As the Commission observed, in no case in its 44 years of experience has a licensed project coincided, with respect to location and character of structure, with the project described in the original permit application (II R. 644-645). In these circumstances, limiting the scope of permits to facilities described in advance would strip the permittee of precisely the protection the permit is supposed to give. Careful investigation of possible alternative facilities would destroy the intended protection for the permittee's investment. Thus, the Commission was right in concluding that limiting permits in the fashion advocated by the Supply System would discourage investment in the investigation of alternative possibilities that might defeat a permittee's priority, and thus would be wholly at odds with the statutory scheme; the type of permit contemplated by the Act is a permit covering mutually exclusive facilities for the development of essentially the same resources.

It is no answer to contend, as does the Supply System (Br. p. 35) and as did the dissenting Commissioners (II R. 699-701, 802), that the "flexibility" contemplated by the Act can be supplied by the amendment of permits to cover "best adapted" facilities evolved in the course of a per-

mittee's investigations. As the majority of the Commission observed, either the *original* permit creates a priority with respect to any such facilities, or it will not protect the permittee's investment in their discovery and development. If the original permit covers such facilities, amendments would add nothing to the permittee's rights. If the original permit does not cover such facilities, a late-arriving preference applicant would be entitled to assert his "preference" and appropriate the product of the permittee's investment when the permittee applied for the required amendment. Thus the protection provided by the permit would be illusory. (See II R. 653-654, 790-792.)[13]

3. The preference accorded to states and municipalities by Section 7(a) of the Act (16 U.S.C. 800(a)) does not affect these conclusions. The Congress determined that competition between prospective licensees should be at the

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[13] The Supply System asserts that Commission regulations required Pacific Northwest to obtain an amendment of its permit before seeking a license for High Mountain Sheep (Br. pp. 25-26, 51-52). However, the arguments as to the need for amendments were thoroughly canvassed by the Commission (II R. 653-654, 699-701, 790-792, 802). The Commission's decision that its regulation did not require Pacific Northwest to obtain an amendment followed its previous decision in *The Montana Power Co.*, 17 F.P.C. 834 (1957), which held that amendments will be denied when the applicant seeks only to substitute for the project provisionally described in his permit a better adapted project for developing essentially the same resources. See p. 43, *infra*. And on its face, the regulation on which petitioner relies does not purport to say *when* an amendment is required, it provides only the procedure to be followed *if* an amendment is sought: "Applications for amendments of preliminary permits shall follow the form prescribed for original applications, as far as applicable. If an application for an amendment embraces sites or areas not covered by the original permit, notice of such application will be given in the manner required for the original application . . . ." 18 C.F.R. 4.84. It begs the question, of course, to suggest, as does the Supply System (Br. pp. 25-26, 51-52), that the second sentence of that regulation was somehow violated because Pacific Northwest's permit did not cover the project for which it sought a license; we say, and the Commission and the Court of Appeals both held, that Pacific Northwest's permit *did* cover High Mountain Sheep.

beginning of proceedings, before the issuance of the preliminary permit, rather than at the later licensing stage. That is true even when the competing prospective licensee is a preference applicant.[14] Thus, the Congress provided that "[i]n issuing preliminary permits hereunder *or licenses where no preliminary permit has been issued* . . . the Commission shall give preference to applications therefor by States and municipalities . . ." (16 U.S.C. 800(a)) (empha-

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[14] The legislative history of the Act shows that this was the intention of the drafters of the legislation and that Section 7 was amended to read as quoted in the text above to remove what otherwise might have been an ambiguity in this regard. See the testimony of Mr. O. C. Merrill, the chief draftsman of the bill and the principal administration spokesman for it, House Hearings, 50-51:

"Mr. McLAUGHLIN. In regard to the preliminary permits and the rights under them there is a provision for preliminary permits to enable one who wishes to make an investigation and to determine whether or not the project that he is looking into is feasible or not and whether he wishes to apply for a permanent license. Are his rights properly and sufficiently protected under section 7, which gives the municipality a prior right, regardless of the fact that there may be a preliminary permit out and the permittee may have put in a lot of time and incurred a great deal of expense, still the municipality may step in and take it away from him, and besides it is entirely within the power of the commission later to prefer somebody else regardless of the expense that the temporary permittee has incurred. It has occurred to me that the rights of the temporary permittee are not properly safeguarded in that section.

"Mr. MERRILL. I am a little doubtful of that myself. . . .

". . . .

"In a great many cases there is a large amount of money involved in making the preliminary investigation, such as would be covered under the preliminary provision provided here. There are surveys to be made, water measurements to be taken, and borings, which may in the aggregate run up to $100,000 or $200,000. So I am going to suggest to the committee when the question of amendment comes up that provision be made in section 7 to include preferences for preliminary permits where they have been issued so as to make it clear what was the original intention, that the preferences in section 7 should not work against the preliminary permittee under section 5 who complied with the terms of his permit.

". . . .

"Mr. TAYLOR. The Public Lands Committee has very consistently

sis added). Accordingly, controversies as to the scope accorded preliminary permits do not in principle align the interests of preference agencies on one side and the interests of privately owned companies on the other.

Indeed, the protection a preliminary permit provides is fully as important to public agencies as it is to private companies, for a public agency's investment in exploratory studies for the development of particular water resources

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and very emphatically gone on record on every one of these water-power measures on the proposition of giving the municipalities the preference right for water-power plants for municipal purposes, if they had the ability and desire to do so.

"Mr. MERRILL. I would not disturb that.

"Mr. TAYLOR. You are not in favor of eliminating that feature from this bill?

"Mr. MERRILL. No; *I would want them to come in and make their application. A municipality can make its application for a preliminary permit just the same as a private applicant. It is hardly a reasonable situation for a municipality to wait until the private individual or corporation has gone in and spent* $100,000 *or* $200,000 *and then come in and push them out.*" (Emphasis added.)

See also testimony of C. F. Kelley, House Hearings, 294:

"Section 7 contains an objectionable feature, in my opinion, in the following language:

"'That in issuing licenses hereunder the commission may in its discretion give preference to applications for licenses by States and municipalities.'

"Now, no one will contend that a State or a municipality should not have a preference right, as distinguished from the right of a private corporation. That we concede, but that right should be determined at the time of issuing the preliminary permit and not at the time of a hearing on the license." (Emphasis added.)

See also the explanation on the floor of the House by Rep. La Follette (56 Cong. Rec. 9113 (1918)):

"Mr. BARKLEY. I doubt seriously as between these municipalities and States and any private corporation whether there ought to be any preliminary permit or whether any right obtained under preliminary permit should operate as against the right of the community. For instance, it may take four or five months or it may take one month for a municipality which, of course, operates slowly. . . . While they are going through these preliminary steps that make

could be jeopardized by another public agency's application were it not for the protection afforded by preliminary permits. As the Commission noted, "[t]he priority provisions were not designed to counterbalance the preference rights of public bodies. To the contrary, the priority sections have independent significance and are not directed to the public-private power controversy. The purpose of the pri-

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their investment legal, as you gentlemen who are lawyers well know, some corporation may come in and get a preliminary permit, and if that preliminary permit is to operate against the right of the municipality to act later then the effect of changing these words would be almost nullified.

"Mr. LA FOLLETTE. As long as it is left in the discretion of this commission to do this then I can see where the municipality has a show and also the man who has put his money in in good faith in getting a preliminary permit and investigated as to whether or not he wants to put out money. But if you make it obligatory that after the other man has spent his money the municipality or the State could come in and take the benefit of the real work that man had done and take it away from him, it does not look like a square deal to the citizens of the United States.

"Mr. RAKER. A municipal corporation does its business openly, not behind closed doors. It takes them five or six months to get a resolution from the board of directors or council and this is all talked about. The corporation instanter goes out and makes application. All along they know what the city is doing, and it may be six months before the city can get its resolution passed, or it may be a year; and in the meantime Mr. Corporation has hot [sic] his permit and he has got it in his pocket, walking up and down the street with a great deal of gusto; and the municipality is down and out.

"Mr. MILLER of Washington. The gentleman is acquainted with the fact that there is a rapidly growing sentiment in the West for municipally owned hydroelectric plants. Does the gentleman think the provisions in the bill—the provisions that the bill carries—will stimulate the growth of municipally owned plants of that character?

"Mr. LA FOLLETTE. I will say yes. *It gives them, providing they exercise the right to take out a permit, a preference right over any private individual or corporation.*

"Mr. MILLER of Washington. The gentleman looks with favor upon that class of operated hydroelectric plants?

"Mr. LA FOLLETTE. I do. Wherever the interests of the public are best served by it, I think it is just as well and better to give it to the municipality than it would be to give it to private individuals to do the same thing." (Emphasis added.)

ority provisions is to encourage development of the nation's waterways by giving reasonable protection to a party investigating the development of a given reach of the river. . . . The priority provisions were drawn to afford protection to one who makes such investigations, irrespective of whether the party involved is a private or public agency" (II R. 787). In short, to the extent the Supply System suggests that the Commission's decision as to the scope of preliminary permits somehow will augment the rights of private parties at the expense of public agencies, that suggestion is in error.

Accordingly, as the Commission concluded, the type of permit contemplated by the Act is a permit covering mutually exclusive alternative plans for the development of essentially the same resources (II R. 645-646). Limiting preliminary permits to facilities provisionally described in advance of the investigations which the permits are supposed to encourage would be wholly antithetical to the purpose the Congress intended such permits to serve.

B. *Pacific Northwest's permit was the type of permit contemplated by the Act and accordingly covered High Mountain Sheep.*

The Commission and the Court below likewise were correct in concluding that Pacific Northwest's permit was the "type of permit contemplated by the Act" (II R. 645-646) —a permit covering mutually exclusive facilities which would develop essentially the same water resources—and thus covered not only "Mountain Sheep-Pleasant Valley" but also "High Mountain Sheep."

1. It is clear on the face of the permit itself that it was meant to apply to mutually exclusive facilities developing the Middle Snake River, and not only to the single alternative provisionally described by Pacific Northwest in its per-

mit application. Thus, the permit provided that a license would be issued only for the project which, as required by Section 10(a) of the Act (16 U.S.C. 803 (a)), would "be best adapted to a comprehensive plan for the improvement and utilization of the site for purposes of navigation, of water-power development, and for other beneficial public uses, including recreational purposes" (I R. 161); and that "the priority granted under the permit" would be maintained only if the permittee modified its plans "as may be required by the Commission" in the event the project eventually proposed in the permittee's license application "is not such as in the judgment of the Commission . . . will be best adapted to a comprehensive plan for the improvement and utilization of the site" (I R. 162-163).

Moreover, Pacific Northwest's permit contained six specific provisions—provisions not found in the standard Power Commission "conditions" to preliminary permits—which "required Pacific Northwest to cooperate with federal, state, and other interested agencies for the purpose of evolving the best development of the Snake, irrespective of the detailed description of the project as tentatively proposed" (II R. 646). Thus, Article 10 required Pacific Northwest to cooperate with the U.S. Forest Service to develop a plan to alleviate damage to and achieve maximum utilization of National Forest resources. Articles 11 and 12 required Pacific Northwest to negotiate and cooperate with the U.S. Fish and Wildlife Service and various commissions of the states of Idaho and Oregon in formulating measures to conserve fish and wildlife. Article 13 required Pacific Northwest to cooperate with state agencies in Idaho and Oregon, the National Park Service, and the U.S. Forest Service regarding the recreational phases of the project. Article 14 required Pacific Northwest to cooperate with the Bureau of Mines concerning mineral resource possibilities. And Article 15 required Pacific Northwest to cooperate

with the Corps of Engineers and the Bureau of Reclamation "with the object of determining a plan of development for the two sites best adapted to a comprehensive plan of development of the water resources of the Snake River" (I R. 157).

In view of those provisions, the Commission surely was right in concluding that the permit was intended to be the "type of permit contemplated by the Act" (II R. 646) —*i.e.*, a permit covering mutually exclusive plans for developing essentially the same stretch of river (II R. 642-645)—and that "[t]o adopt a narrow interpretation of the permit would be anomalous in that [Pacific Northwest] would be required to develop the best plan of development when it would thereby lose its priority to carry out the development" (II R. 646).

2. To be sure, as the Supply System points out (Br. pp. 24-25), the permit recited that it was issued for the "sole purpose" of maintaining priority of application for a license for Project No. 2173—the number assigned to Pacific Northwest's permit application—the tentative boundaries of which were set forth (I R. 155). However, the Commission viewed the "sole purpose" language "as emphasizing the fact that no construction authority was being granted, but only a priority to conduct investigations" (II R. 648). Thus, the order issuing the permit provided that "the permit issued herein does not authorize construction of the proposed project—being for the sole purpose of maintaining priority of application for a license for the project under the terms of the Federal Power Act" (I R. 154). Indeed, Section 5 of the Act uses the same "sole purpose" language for the same reason. In short, the "sole purpose" language was not intended to restrict the geographical scope of the permit but instead was intended to make clear

that a license would have to be issued to authorize any construction.

To be sure also, the permit referred specifically to "Project No. 2173"—the number assigned to the permit application—and included the information Pacific Northwest had supplied in accordance with Commission regulations requiring applicants for permits to specify the "tentative" boundaries and "approximate" location of the project (18 C.F.R. 4.82(k), Exhibits H and I). However, contrary to the contentions of the Supply System, those references in the permit to Project No. 2173 and the inclusion in the permit of a description of the project "as described in the application" were not intended as limitations on the geographical scope of the permit for purposes of the priority afforded by Section 5 of the Act (16 U.S.C. 798). That is so, first, because such a reading would be contrary to the statutory purposes of the permit provisions of the Act (see pp. 28-33, *supra*), which is incorporated into the permit by reference (I R. 155); second, because under the regulations, which are also incorporated into the permit by reference (I R. 155), the boundaries and location specified in the application and set out in the permit are "tentative" and "approximate"; and third, because the language of the permit itself ("[a]s described in the application, the project would consist of . . .") cannot reasonably be read as meaning that the "proposed" project could *only* consist of the specific facilities provisionally described in the application.

The Commission's regulations, which require the tentative description of a proposed project, were designed to foster "a sensible program of land withdrawals" under Section 24 of the Act (II R. 647). Section 24 provides that public lands included in any proposed project shall be reserved from entry, location, or other disposal under federal law until otherwise directed by the Commission or

by the Congress, and also provides that "[n]otice that such application has been made, together with . . . a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located" (16 U.S.C. 818). The Commission is of the view that requiring an applicant for a permit to specify the most likely facilities and their tentative boundaries, instead of listing all alternatives, is necessary in order to implement Section 24 and to prevent excessive land withdrawals thereunder (II R. 646-648, 793-795). Surely the Commission's regulations in this regard are not unreasonable.

The Supply System attacks the Commission's view of its regulations because the regulations require a description of the boundaries of a proposed project whether or not public lands are within those boundaries (Br. p. 33). But it is the Commission, not the applicant, that must give notice of land withdrawals under Section 24, and there is no reason why the Commission may not require all applicants for permits to furnish descriptions so that the Commission itself may determine whether public lands will be affected. Further, the Supply System contends that a permit cannot have two geographical "scopes"—one for purposes of land withdrawal under Section 24, and another for purposes of "priority of application for a license" under Section 5 (Br. pp. 32-35). But the language of the two provisions is different and so are the underlying statutory purposes. The land withdrawal provision protects the permittee from speculation in public lands at his expense,[15] and in turn protects the United States if it elects

[15] Section 21 of the Act (16 U.S.C. 814) provides for condemnation of land needed for a licensed project and just compensation therefor. By providing for the automatic withdrawal of public lands upon the filing of an application for a permit, Section 24 of the Act (16 U.S.C. 818) prevents private acquisition of public lands, following the filing of such an application, for the purpose of speculation to the ultimate detriment of the permittee in the event he obtains a license.

to pay for and recapture a project at the end of the license period (16 U.S.C. 807). But the price of withdrawals is that other people cannot use the land that is withdrawn. In these circumstances, holding the permittee, for land withdrawal purposes, to his advance guess as to the "best adapted" project is not an unreasonable reconciliation of the conflicting policy interests at stake. On the other hand, the policy considerations at stake under Section 5 are entirely different. Section 5 was designed to protect the permittee's investment in making the investigations necessary to devise a "best adapted" project and thus to encourage resource development. In these circumstances, holding the permittee to his advance guess as to the ultimate outcome of the investigations the permit is intended to foster would be wholly at odds with the purpose of Section 5. Accordingly, since the underlying statutory purposes of Sections 5 and 24 are different, the "scope" of a preliminary permit for purposes of each of those two sections quite properly may differ also.

3. Moreover, the Commission's interpretation of Pacific Northwest's permit was not a new departure. If Pacific Northwest's permit is not read as covering mutually exclusive facilities for the development of essentially the same resources, it follows that from the time the Water Power Act was first enacted the Commission has been issuing permits which are plainly inconsistent with the purpose the Congress intended such permits to serve, and the industry has been accepting permits which provide no protection. The contents of applications and the basic form of permits were prescribed by the Commission at the beginning of its administration of the Act.[16] The Commission found that not once during the entire history of the Act has a project been licensed which is the same as the project provisionally

[16] See 1 F.P.C. Ann. Rep., pp. 17-20, 201-204 (1921).

described in the preliminary permit and the application therefor. In these circumstances, the consistent administrative practice argues strongly against the narrow reading of the permit advocated by the Supply System—a reading that would frustrate the statutory purpose of the permit.

Furthermore, the Commission's interpretation of Pacific Northwest's permit—as covering mutually exclusive facilities for the development of essentially the same resources—simply followed a previous Commission decision concerning the scope of a permit containing language identical to that in Pacific Northwest's permit (II R. 648)—*The Montana Power Co.*, 17 F.P.C. 834 (1957). In that case, Montana Power—one of the four owners of Pacific Northwest—sought an amendment to the permit to specify an alternative project developing resources which could be developed by projects already described in the permit. The Commission denied the requested amendment, holding that the alternative project was already covered by the permit. (See II R. 648-650). Thus, the Commission's interpretation of Pacific Northwest's permit simply followed established practice.

4. The Supply System also contends that the Commission's interpretation of the permit "is at war" with decisions strictly construing grants of privileges in public lands and waters, and "conflicts" with licensing systems under other federal land and water laws (Br. pp. 42-46). To support those assertions it cites decisions that a license to build a bridge across a navigable river did not confer immunity from the federal government's power to order the making of alterations in the bridge;[17] that a grant of a right-of-way to encourage the construction of railroads

[17] *Louisville Bridge Co.* v. *United States*, 242 U.S. 409 (1917).

did not include mineral rights;[18] that a grant to power companies of a general statutory right to build dams across non-navigable streams in Cherokee territory subject to control by the Oklahoma legislature did not convey any property rights;[19] and that the grant of a franchise to build a bridge at one site did not carry with it an immunity from the franchising of competing bridges.[20] So, too, it points out that prospecting, timber and grazing permits carry no rights outside the territory covered by such permits, and that a permit to construct a pipeline at one place carries no right to construct it at another. It might have added that under the Water Power Act, a license to build a dam grants only the right to build the dam at the site specified in the license.

However, the scope assigned to bridge, dam, and pipeline construction licenses, to grants of railroad rights-of-way, and to mineral, timber and grazing permits is wholly irrelevant here because the purposes served by such licenses are quite unlike the purposes Congress intended preliminary permits to serve. Whatever the situation may be with respect to other statutes and other kinds of licenses, preliminary permits must be accorded the scope the Commission has given them if they are to serve their statutory purpose—to encourage the exploration of mutually exclusive facilities intended to develop water resources by protecting the preliminary investment in such exploration. Thus, more to the point than the decisions cited by the Supply System are this Court's decisions that in view of the underlying statutory objectives of the licensing schemes involved, the Civil Aeronautics Board could lawfully grant an airline a license for routes not specified in the airline's

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[18] *United States* v. *Union Pacific R. Co.*, 353 U.S. 112 (1957).

[19] *United States* v. *Grand River Dam Authority*, 363 U.S. 229 (1960).

[20] *The Charles River Bridge* v. *The Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837).

license application but located in the same general area, *Civil Aeronautics Board* v. *State Airlines,* 338 U.S. 572 (1950), and the Interstate Commerce Commission could lawfully grant a motor carrier a license to serve points which the carrier did not seek to serve, *Chicago, St. P., M. & O. R. Co.* v. *United States,* 322 U.S. 1 (1944)—in both cases in the face of competitors' complaints as to an alleged lack of "notice" (338 U.S., at 578-581; 322 U.S., at 3-4). In short, the Commission's construction of Pacific Northwest's permit is "at war" only with the Supply System's curious notion that it has the right to the fruit of Pacific Northwest's labors.

5. Also, while not urging the alleged grievance as a ground for reversal, the Supply System claims repeatedly that the Commission's decision as to the scope of the permit made it possible for the Commission to license the Supply System's "superior" project to Pacific Northwest (Br. pp. 7-8, 12-13, 46-47). The Commission's opinions demonstrate that this claim is unfounded.

The Supply System does not dispute that, in the Commission's first opinion and order, the Commission licensed the physical project that Pacific Northwest had proposed, not the one the Supply System proposed some two years after Pacific Northwest applied for its license (II R. 672, 673-676). On petition for rehearing, the Commission made tentative modifications in the initial power installation, changing it from 875,000 kw to 1.2 million kw (II R. 796-797, 799-800), approximately the same as that proposed both in Pacific Northwest's original license application (I R. 167) and in subsequent Pacific Northwest proposals (IV R. 353). It also changed the generators to a larger size (II R. 796-797, 799-800). To be sure, the latter change was in accord with proposals made by the Supply System, but it also was in accord with Pacific Northwest's statement on the record that it would incorporate even larger units in its final design (I R. 22). In any event, the critical

consideration is that, as is abundantly clear from the Commission's discussion of the matter, the Commission did not think that by ordering these changes it was "substituting" the Supply System's design for Pacific Northwest's or that the Supply System's design was "superior." Rather, as the Commission pointed out, it was simply making a tentative determination respecting a highly technical subject—which turns upon such matters as plant factor, system load factor, load growth, peaking capacity available, and transmission capability (I R. 8-9; IV R. 152, 180-181)—that is not related to comparative merit of design and will be fully resolved only at final design (II R. 796).[21]

More fundamentally, not only did the Commission not permit Pacific Northwest to preempt the Supply System's

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[21] Thus, in its initial opinion, the Commission concluded that the "differences in construction features" between the two applicants' plans were not "decisive because the plans are not final" (II R. 641); and in its opinion on rehearing, the Commission stated:

> "[The Supply System] complains that we have ignored the difference between its proposal for [High Mountain Sheep] and that of [Pacific Northwest]. This is incorrect. However the differences between the two proposals are of such a technical engineering nature that they must await the submission of final plans. It is impossible at this point to determine the precise nature of the project which will eventually be constructed at [High Mountain Sheep]. We recognized this situation in our decision. . . . [W]e stated that a complete geological study carried out by a more elaborate program of borings is required before construction can be authorized at any [High Mountain Sheep] site. . . . [W]e noted that final plans may differ from what we characterized as the estimates submitted herein. We therefore specifically refused to find that the data submitted respecting these plans precisely represent the ultimate development of either plan. In order to assure that the complete potential of this reach of the river is fully developed by [Pacific Northwest], *i.e.*, that development required by Section 10(a) of the Act, we specifically included Articles 39 through 44 in the license.
>
> "However, to avoid any possible ambiguity, we are modifying our order to describe the project works at the [High Mountain Sheep] site; which, on the basis of present information, we find to be best adapted to a comprehensive plan of development under the test set forth in Section 10(a) of the Act" (II R. 796-797).

project in this case, but it is unreasonable to suppose that the Commission would ever regard a permit as a stealing license.[22] In that connection, it is worthwhile to note that the Commission in this case did compare the respective applicants and their plans and concluded, among other reasons because Pacific Northwest had demonstrated that it could use the power from High Mountain Sheep now while the Supply System had failed to prove either that it had a need for the power or that it could finance the project, that Pacific Northwest was in fact superior to the Supply System (II R. 655-657).[23]

In short, the Commission and the Court below were right in concluding that Pacific Northwest's permit was the "type of permit contemplated by the Act" and therefore covered not only the facilities provisionally described therein but also mutually exclusive facilities for the development of substantially the same resources—*i.e.*, High Mountain Sheep.

II. The Commission's Interpretation of the Permit is Wholly Consistent with the Notice Provisions of Section 4(f) of the Act.

The Supply System's principal contentions concern the notice of Pacific Northwest's application for a permit that

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[22] Accordingly, petitioner's extravagant predictions about "sterilizing," "paralyzing," "locking up," and "deep freezing" of large stretches of waterways are unfounded, for they are based upon petitioner's notion that a preliminary permit "enables [the permittee] to expropriate the superior plan proposed by [a] competitor" (Br. pp. 46-47). To be sure, if the Commission's view of the purposes and scope of preliminary permits is upheld, competition will be inhibited to the extent necessary to accord the permittee the protection necessary to encourage investment and exploration of all alternative methods of developing particular resources. But there is no basis for suggesting that the permittee will be able to secure a license for superior plans devised by a competitor and therefore that competition will be impossible.

We note too that the Commission is convinced that petitioner's extravagant claims will not materialize (II R. 654, 789).

[23] See p. 20 n. 7, *supra*.

the Commission sent to "interested" and "affected" public agencies under Section 4(f) of the Act (16 U.S.C. 797(f)). For reasons stated in the preceding sections of this brief, we submit that Pacific Northwest's permit covered High Mountain Sheep, and therefore that Pacific Northwest was entitled to a priority and the Supply System was not entitled to a preference. The Supply System contends, however, that the Commission's notice was inadequate to inform public agencies that might be interested in assuming the expense of preliminary investigations and in building the resulting "best adapted" project (High Mountain Sheep) that the time had come for them to assert their preference by applying for a permit, and that in consequence the Commission lacked the power to grant a permit to Pacific Northwest covering High Mountain Sheep. That contention is without foundation, first, because the Congress did not intend that the Commission's power to issue permits should be subject to attack on the ground that inadequate notice was given under Section 4(f); second, because the Supply System was not in existence when the notice was given, and entities to which it claims to be a "successor" were rightly determined by the Commission not to be "interested" or "affected" agencies and thus entitled to notice; and third, because in principle and in fact the notice the Commission gave *was* adequate.

1. The legislative history of Section 4(f) of the Water Power Act demonstrates, contrary to the Supply System's unsupported assertions, that the Congress did not intend the notice thereunder to be "jurisdictional" (Br. p. 51) or a "condition precedent upon the Commission's power to issue [a] permit" (Br. p. 28). The provision which eventually became Section 4(f) was authorized by Mr. Sinnott and was amended on the floor of the House to read virtually as it does now (56 Cong. Rec. 9762-9763)—that "upon the filing

of any application for a preliminary permit . . . the Commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application" and "shall also publish notice of such application . . . in a . . . newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated" (16 U.S.C. 797(f)).[24] A suggestion was then made by Mr. Raker that "the bill ought to contain a provision that in all instances where an application is filed there should be proof submitted to the Commission before it can act" (56 Cong. Rec. 9763)—*i.e.*, that the provision should be strengthened to make the notice a "condition precedent" to the Commission's power to issue a valid permit. Mr. Sinnott flatly rejected the suggestion (56 Cong. Rec. 9763):

> "Mr. SINNOTT. The only trouble with that is that I do not want to make it too complicated. I would prefer to have it directory rather than jurisdictional. Let the matter rest with the commission, otherwise you are going to get it tied up in legal technicalities, such as whether proper notice has been published, and so forth. I think the commission could handle the matter."

Thus, even if the notice given by the Commission in this case were defective (which as we show below it was not), it could not be claimed that the defect is "jurisdictional" and consequently that Pacific Northwest's permit was ineffective to confer on Pacific Northwest priority of appli-

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[24] Following the amendments at 56 Cong. Rec. 9762-9763, the provision was identical to the provision that became law, as quoted above, except that the last clause called for publication in a newspaper "published in the county or counties affected by said application."

cation for a license for facilities within the intended scope of the permit.

2. Beyond that, the Supply System has no standing to complain that the notice given in this case was defective. It can make no such claim in its own right, because it did not exist until 1957 (II R. 610), two years after the notice was given and the permit issued. And it can make no such claim as the "successor in interest" to some other entity, for the entities to which it claims to be a successor were not entitled to notice and accordingly were given none. Section 4(f) provides for written notice to any "State or municipality likely to be interested in or affected by" a permit application—*i.e.*, likely to be interested in asserting a preference and planning and building a project.[25] The Supply System is composed of 16 public utility districts in the State of Washington (II R. 610) and has asserted that it is the "successor in interest" to the Northwest Public Power Association and the National Hells Canyon Association (I R. 210; II R. 718), two associations of public agencies and other advocates of public power. The record shows that the Commission determined that the notice required by the Act was given (I R. 155), yet it was not given either to any of the 16 Washington public utility districts or to the two public power associations. (See Appendix, p. 71, *infra.*) Thus, the Commission determined that those entities were not "interested" or "affected" agencies at the time and thus entitled to notice. That determination was right, for there is nothing in the record to show that the Commission had any reason to anticipate that Washington public utility districts might be interested in building dams in Oregon and Idaho or that either of the two associations could build a dam anywhere. Indeed, from 1954 to 1958 when the Supply System filed its Nez Perce appli-

[25] See 56 Cong. Rec. 9762.

cation, the two associations' only expressed interest in the proceedings consisted of advocating federal construction at Nez Perce (II R. 792-793). In these circumstances, it is not surprising that the Supply System does not contend that the Commission erred in not giving these entities written notice. They were entitled to none. Consequently, the Supply System is not in a position to claim, as their "successor," that the Commission's form of notice was defective. The Supply System should not be heard to complain that it or its "predecessors" were misled by the description in a notice which they did not receive, to which they were not entitled, and on which they surely did not rely.[26]

3. We have just shown that the Congress did not intend that permits should be subject to attack on the ground that inadequate notice was given under Section 4(f), and that even if that were not true, the Supply System has no standing to complain of inadequate notice—either in its own right or on behalf of alleged "predecessors" in interest. Therefore, Pacific Northwest's permit is not subject to challenge on grounds of inadequate notice. We show now that the Commission's approach to notice is sound. In 44 years of experience under the Act, this is the first case of which we are aware in which the notice given by the Commission has been questioned. Moreover, there is no reason why an affirmance in this case should give rise to notice problems in the future.

a. Under Section 4(f), when an application for a preliminary permit is filed, notice of the application is given

[26] In these circumstances, we are baffled by the assertions in the Supply System's brief (p. 31) that "[t]he decision below is wrong because it destroys the public preference in sites and areas excluded by the notice on which *they* were entitled to rely"; that "[*t*]*hey* did rely on it here"; and that "*they* were misled" (emphasis added). *Who* relied on *what?* The record does not show, and the Supply System does not say.

to "any State or municipality likely to be interested in or affected by such application" (16 U.S.C. 797(f))—*i.e.*, any public agency which the Commission thinks may have an interest in building. The notice specifies the tentative boundaries and approximate location of the facilities provisionally proposed in the application (II R. 810-811). If any preference body receives such a notice (or otherwise becomes aware of the pendency of the permit application) and has any intention itself to develop the resources involved, it knows that its potential interest is directly affected. It knows that if the applicant for a permit eventually receives a license for the project provisionally proposed, construction at *any* incompatible site will be precluded forever. As the Commission noted, "[o]nce a party, preference or otherwise, has a permit describing a project which would develop a specific stretch of the river, everyone is on notice that the permittee has priority to construct at least the project described in the permit. Quite clearly this would foreclose *any* development on that stretch of the river contemplated by any other party. It is therefore inconsequential, as far as notice is concerned, if the construction plans are altered as long as the same reach of the river is involved" (II R. 654). In short, if a public agency receiving notice of an application for a permit has ambitions to develop the resources to which the application relates, it knows that the time has come for it to do *something*. That is equally true whether the agency believes that the sites provisionally described in the application are likely to be the "best adapted" sites for comprehensive development of the waterway, or believes instead that other sites may be preferable.

Under the Commission's decision, and its previous *Montana Power* decision (p. 43, *supra*), a public agency thus knows that the time has come for it to act—that if it wishes to assert a preference, either with respect to the facilities

provisionally proposed in the permit application or with respect to any mutually exclusive facilities, it must seek a permit. The purpose of the Act is to encourage investment of nonfederal capital. See pp. 28-32, *supra*. That purpose is not served by permitting an agency to lie in wait, while the permittee undertakes the great expense of finding and planning the project that is best adapted, and then permitting the agency to defeat the permittee's license application, thus rendering the permittee's priority worthless, on the ground that the permittee was successful in discovering the best project.

The Commission's decision, accordingly, is wholly consistent with the statutory scheme. As we have shown, the Congress accorded a preference to public bodies. However, it determined that the preference should be asserted *before* a permit is issued and investigations have been made thereunder, rather than at the later licensing stage. See pp. 33-37, *supra*. This serves the purpose of encouraging nonfederal investment, whether made by a public or private body, necessary to determine the proper location and nature of facilities "best adapted" to comprehensive development of particular waterways. In short, there is no merit to the Supply System's claim that the Commission's form of notice somehow deprives interested agencies of adequate notice. Cf. *Civil Aeronautics Board* v. *State Airlines, supra*, 338 U.S. at 578-581; *Chicago, St. P., M. & O. R. Co.* v. *United States, supra*, 322 U.S. at 3-4.

b. The Supply System makes dark predictions as to the difficulty of application of the Commission's test as to the reach of a permit. But it requires no occult powers to determine whether a project in which a particular agency may be interested overlaps—is incompatible with—facilities tentatively described in a permit application. Indeed, this case illustrates the point. From the very beginning,

the controversy as to the proper development of the Middle Snake has centered upon the choice among several alternative plans for the development of the Snake from its confluence with the Salmon upstream to Hells Canyon, with the principal controversy concerning the protection of the fishery resources of the Salmon. (See pp. 2-21, *supra*.) And from the very beginning all interested parties have recognized that High Mountain Sheep, Mountain Sheep-Pleasant Valley, and Nez Perce were mutually exclusive alternatives. Specifically, the predecessors of the Supply System so recognized. As the Commission noted, "[s]ince at least 1954, [the Supply System] and its predecessor in interest, the Northwest Public Power Association, have actively participated in all of the proceedings involving this reach for the purpose of advocating the advantages of Nez Perce over alternative sites on the Snake. At the public hearings . . . on the preliminary report in S.D. 51, then proposing what is now High Mountain Sheep, Mr. Gus Norwood, Executive Secretary of the Northwest Public Power Association, filed a protest because High Mountain Sheep would pre-empt Nez Perce" (II R. 792). Then when Pacific Northwest applied for a permit, the Association protested Pacific Northwest's application on the ground that Mountain Sheep-Pleasant Valley likewise would preclude location of a project at Nez Perce. Later, the Association intervened to oppose a license for Mountain Sheep-Pleasant Valley, and then intervened in this proceeding to oppose a license for High Mountain Sheep, on the same ground (II R. 792-793; IV R. 322-323). Thus, the actions of the Supply System and its predecessors establish, as the Commission concluded and as the Supply System surely cannot dispute, that the Supply System and its predecessors have always recognized that the Mountain Sheep-Pleasant Valley, High Mountain Sheep and Nez Perce projects are incompatible.

Under the Commission's approach, if some public agency had wished to secure a license for one of the three projects on the basis of preference, it was obliged to move when Pacific Northwest applied for a permit and take on the expense of investigation itself. The public agencies did not do so because they did not care to underwrite the costs of development and hoped instead, as the Commission noted (II R. 793), that the federal government would do so. Only when it became apparent that the federal government could not be induced to construct Nez Perce did the Supply System appear on the scene and apply for a license, and even then its avowed purpose was not so much to acquire a license as to insure that any project constructed would be located at Nez Perce rather than at High Mountain Sheep (I R. 2-4; II R. 792-793; IV R. 1-5).[27] Thus, the managing director of the Supply System testified before the Examiner: "I am sure [that] had [Pacific Northwest] . . . seen fit to make a filing on the Nez Perce project, in my opinion the public agencies wouldn't have made a filing on the Nez Perce project" (II R. 793). In short, as the Commission concluded, the Supply System "was never really misled or deprived of notice. To the contrary [it] knew exactly what was going on . . ." (II R. 793).

III. The Preliminary Permit was Still in Force When Pacific Northwest Applied for its License.

The Supply System also claims that Pacific Northwest's preliminary permit conferred no priority upon its application for a license for High Mountain Sheep because, according to the Supply System, (1) the denial of Pacific Northwest's first license application terminated the permit before the expiration of its three-year term, and (2) the High Mountain Sheep license application was not com-

[27] Nor did it even then wholly abandon its basic purpose, to block Pacific Northwest and promote federal construction (I R. 86).

pleted until after the expiration of the three-year term. The Commission and the Court below quite rightly rejected both contentions (II R. 650-652, 788; IV R. 385).[27a]

A. *The denial of Pacific Northwest's first license application within the three-year term of the preliminary permit did not terminate the permit.*

1. Pursuant to Section 5 of the Act (16 U.S.C. 798), Pacific Northwest's preliminary permit was issued by the Commission for a stated term of three years (I R. 155). The conclusive answer to the Supply System's claim that the denial of Pacific Northwest's first license application terminated the permit before the expiration of its three-year term is that the Act and the permit spell out the circumstances under which a permit may be terminated before the expiration of its stated term, and denial of a license application is not among them. Section 5 of the Act provides that preliminary permits "shall set forth the conditions under which priority shall be maintained" and may "be cancelled by order of the Commission upon failure of permittees to comply with the conditions thereof or for other good cause shown after notice and opportunity for hearing." Article 3 of the permit accordingly specified the circumstances under which "the priority granted under [this] permit will be lost"—denial of a license application was not mentioned[28]—and as the Court below observed,

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[27a] It seems doubtful to us that these issues are properly before the Court. They were mentioned only in a footnote to the petition for certiorari, in which petitioner stated that "[i]f certiorari is granted . . . Petitioner requests the privilege of also briefing and arguing" them (Pet. p. 5 n. 5), and no argument is or can be made that they are of any general importance. See Rule 23(c), (h), Rules of the Supreme Court of the United States.

[28] Article 3 of the permit (I R. 162-163) provided:

> "*Article 3.* The priority granted under the permit will be lost if the Permittee fails to fulfill the requirements of the permit, if the permit is cancelled by order of the Commission, or if in course of consideration by the Commission of said application for license, the

the "Commission did not order cancellation of Pacific Northwest's preliminary permit when the Mountain Sheep-Pleasant Valley license application was denied . . ." (IV R. 385). Accordingly, the permit remained in full force and effect to the end of its stated three-year term.

2. Thus, nothing either in the Act or the permit supports the Supply System's contention that the denial of Pacific Northwest's first license application terminated the permit before the expiration of its three-year terms. The Supply System contends that the denial of the first license application terminated the permit because, in a 1923 opinion, the Commission's General Counsel wrote that the "priority given by a preliminary permit attaches . . . before a definite application for use can be made, and subsists until application for license in proper form is filed. . . . When appli-

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Permittee shall not on or before the date of expiration of the permit, or such later date as may be fixed by the Commission:

"A. File data required by the Commission in addition to that contained in or furnished with said application; or

"B. Present satisfactory evidence of ability to carry out the plan as set forth in said application, or as required to be modified by the Commission; or

"C. Accept the conditions of the proposed license; or

"D. Modify the plans as may be required by the Commission if the project adopted as disclosed in said plans is not such as in the judgment of the Commission, based upon the consideration set forth in Article 2 hereof, will be best adapted to a comprehensive plan for the improvement and utilization of the site for the purposes of navigation, of water-power development, and for other beneficial public uses, including recreational purposes."

Apart from the fact that the Commission never ordered cancellation of the permit, with or without notice and an opportunity for hearing, and thus the permit remained in effect for its stated term under the provisions of Section 5, none of the circumstances specified in Article 3 as justifying cancellation existed. (1) The Supply System cannot point to any "requirements of the permit" which Pacific Northwest did not "fulfill." (2) The Commission did not, of course, find "other good cause" and order cancellation. And (3) no claim can be made that "in course of consideration by the Commission of [the Permittee's first] application for a license," Pacific Northwest (A) failed to file data required by the Commission; or (B) failed to present satisfactory evidence of its ability to carry out its

cation for license, duly perfected, . . . is filed, the preliminary permit has served its purpose. The priority attaches to the application for a license and attends it until the application is withdrawn or is granted or rejected by the Commission'' (3 F.P.C. Ann. Rep., pp. 222, 223 (1923)).

But that language from the General Counsel's Opinion was not addressed to the question presented here—whether the denial of a license application *before* the expiration of the stated term of a permit terminates the permit. Rather, it was addressed to the entirely different question whether a permittee *loses* his priority *after* the expiration of the stated term of a permit when he has filed his license application within the stated term but the Commission has failed to act on the application.[29] Accordingly, while the Supply

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plans; or (C) failed to accept the conditions of the proposed license (no license was granted so there were no conditions to accept); or (D) failed to modify its plans "as may be required by the Commission if the project as disclosed in said plans is not such as in the judgment of the Commission . . . will be best adapted to a comprehensive plan for improvement and utilization of the site." The Commission denied Pacific Northwest's first license application on the ground that Nez Perce was the superior plan of development but did not give Pacific Northwest the opportunity to modify its plans in accordance with the determination. Pacific Northwest then requested the Commission to order such modification and, further, asked the Commission to consider the substitution of a high storage dam at High Mountain Sheep as better adapted to a comprehensive plan of development than Nez Perce would be. However, the Commission denied those requests (II R. 855-865). Consequently, a few days later (on the last day of the three-year term of permit), Pacific Northwest filed its High Mountain Sheep license application. Accordingly, it cannot be claimed that Pacific Northwest failed to modify its plans "as . . . required by the Commission"—no modifications were required by the Commission—and in any event, by filing its second license application, Pacific Northwest *did* modify its plans to propose what the Commission now has determined is the project "best adapted to a comprehensive plan for the improvement and utilization" of the reach of the Snake here in issue.

[29] The opinion sets forth the questions to which it was addressed as follows (3 F.P.C. Ann. Rep., p. 222): "*Subject:* Expiration of priority under a preliminary permit.

"In your memorandum of February 26, 1923, you say—

> "'It has been the practice hitherto in issuing preliminary permits to fix a date for filing final maps and plans several months prior to

System asserts that the "Commission has followed the rationale of the 1923 opinion in its administration of preliminary permits" (Br. 62 n.1), each of the instances which it cites (Br. p. 61 n.11, p. 62 n.1), in which the Commission has terminated permits following the denial of license applications, was a case in which the denial of the license application was *after* expiration of the stated term of the permit. It is one thing to rule that a permittee does *not* lose his priority because the Commission is unable to act on his license application within the stated term of his permit, and quite another to say that he *does* lose his priority, before the expiration of the permit, because a license application is denied. The General Counsel's Opinion had nothing to do with the latter problem.

In short, the Commission was right in concluding that the issue with which the General Counsel's Opinion dealt was "whether priority extends beyond the term specified in a permit in situations where a permittee filed a license

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the expiration of the preliminary permit in order to give adequate time for reviewing such plans and for action of the commission before the permit should have expired. This practice has been followed on the assumption that priority expired with the expiration of the preliminary permit, and could be maintained after such expiration only by extension of permit. Further consideration of the matter has raised a doubt whether such an assumption is correct.'

"You ask that I review the pertinent provisions of the Federal water power act approved June 10, 1920 (41 Stat. 1063), and give my opinion upon the following:

"'If a preliminary permittee, within the time prescribed by his permit, has filed the maps, plans, specifications, and other data required by the terms of the permit and has otherwise complied in full therewith—

"'(1) Does the priority granted such permittee under the provisions of section 5 of the Federal water power act expire with the expiration of the permit; and if not, when does it expire?

"'(2) Is such priority limited to the three years specified in said section as the maximum aggregate period for which a preliminary permit may be issued?

"'(3) If such priority does not so expire, is it necessary to extend the period of the permit if final action has not been taken by the commission before such period has expired?'"

application within the duration of the permit. On this point, there is no dispute. But that is quite a different question from the one involved here, *i.e.*, whether a permit terminates upon the filing of [a] license application" (II R. 650). The answer to *that* question is provided by Section 5 of the Act. Section 5 provides for priority "for such period or periods, not exceeding a total of three years," as may be fixed by the Commission (16 U.S.C. 798). Section 5 "does not state that a permit expires when a license application is filed nor does it state that a permit somehow 'merges' into a license application" (II R. 650). Rather, in accordance with Section 5, Article 3 of Pacific Northwest's permit specified the "conditions under which the priority granted by the permit [would] be lost. None of these conditions is present in this case" (II R. 650). Accordingly, the permit remained in effect until its stated three-year term expired.[30]

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[30] The Supply System also contends that the grounds on which the Commission denied Pacific Northwest's first license application—that Nez Perce is superior to other projects (II R. 842)—acquired "statutory finality" following the denial of the first license application because Pacific Northwest did not appeal the determination but instead sought a license for High Mountain Sheep, which it deemed superior to Nez Perce (Br. 62). The Supply System concedes that the supposed "statutory finality" of the Commission's first determination "does not necessarily mean that the Commission erred in receiving the new license application for a project within the proscribed area" or that "the Commission is now wrong in reversing its former high evaluation of the Nez Perce site" (Br. 63). The Supply System claims, however, that the supposed "statutory finality" of the first determination "*does* mean that the Commission erred in according to the new application a priority derived from the permit, which its own 1958 decision, not appealed, forbade to be used for the site now before the Court" (Br. 63).

That argument is frivolous on its face. The short answer is that, contrary to the Supply System's assertions, nothing in the 1958 decision (II R. 833-854, 863-865) "forbade" the "use" of the permit or the priority which it conferred for the site now before the Court. Moreover, we know of no authority for the suggestion that the grounds of the first decision acquired some sort of *res judicata* effect which precluded the Commission from entertaining an application by Pacific Northwest for a license which would be granted only if the Commission reversed its view as to the

B. *Pacific Northwest submitted a complete license application for High Mountain Sheep within the three-year term of its permit.*

Pacific Northwest filed its High Mountain Sheep license application (I R. 165-200) on March 31, 1958, the last day of the stated three-year term of its permit and eleven days after the Commission denied its petition for rehearing in the Mountain Sheep-Pleasant Valley proceeding. The Supply System asserts, nevertheless, that "the maximum statutory period of the permit expired eighteen months before the Company submitted a license application on the High Mountain Sheep site conforming to the statute" (Br. p. 63). That assertion appears to rest on two separate contentions: (1) that the license application filed on March 31, 1958, was incomplete, and (2) that Pacific Northwest did not complete the preliminary investigations contemplated by the Act until 18 months after March 31, 1958. Neither contention was made in a timely fashion before the Commission and neither contention has any substance.

1. The Commission rejected the Supply System's contention that the March 31, 1958 license application was incomplete on the ground that it was neither timely nor meritorious (II R. 652 n. 31):

> "In a footnote, [the Supply System] makes the argument in cursory fashion that [Pacific Northwest's High Mountain Sheep] license application was incomplete

superiority of Nez Perce. *Tacoma* v. *Taxpayers*, 357 U.S. 320 (1958), cited by the Supply System, stands for the quite different proposition that in view of Section 313(b) of the Federal Power Act, which prescribes "the specific, complete and exclusive mode for the *judicial* review of the Commission's orders," 357 U.S., at 335 (emphasis added), a Commission determination, affirmed by the Court of Appeals in proceedings under Section 313(b), cannot thereafter be collaterally attacked in state court litigation. Here, however, we deal with further *Commission* proceedings, a matter with which Section 313(b), and therefore the *Tacoma* case, have nothing to do.

> when it was initially filed, and was not completed until after the term of the preliminary permit had expired. Section 4.81 of our regulations and 1.14(a) of our Rules of Practice . . . provide for rejection of applications tendered to the Commission which do not contain the requisite information. [Pacific Northwest's High Mountain Sheep] license application was not rejected but was accepted for filing by the Commission. The fact that additional data was requested here, as in most cases, and submitted does not change our view regarding the adequacy of the filing or the correctness of its acceptance. [The Supply System's] contention is untimely and unmeritorious."

We submit that the Commission's determination is conclusive on either ground.

a. With respect to timeliness, as the Commission noted, the Supply System first made its contention that the March 31, 1958 application was incomplete in a footnote to its exceptions to the examiner's decision, filed long after the record was closed. In these circumstances, the Commission's determination that the contention was untimely was perfectly reasonable. See 18 C.F.R. 1.29(c). There is no reason why this Court should disturb that determination.[31]

b. With respect to the merits, what the Supply System is asking this Court to do, in substance, is to examine the

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[31] The National Hells Canyon Association and the Northwest Public Power Association filed a motion to dismiss Pacific Northwest's license application on the ground that the application was "vague and indefinite" and "incomplete" (IV R. 324-328, 338-340). But those Associations withdrew from the proceedings, and the Commission accordingly did not act upon their motion. To be sure, the Supply System claims that it is the "successor in interest" to the Associations (II R. 718), but there is nothing in the record to indicate that the Supply System adopted the Associations' motion as its own until after the Commission announced its decision (II R. 718).

license application—a lengthy document which includes a number of technical exhibits (I R. 165-200)—to determine whether the Commission was right in concluding that the application included everything required by the regulations. Surely no useful purpose would be served by that. A decision on the point would establish no rule of law but would establish only that this particular application was, or was not, complete. That is a matter which is best left to the Commission's judgment, both because the controlling regulations (18 C.F.R. 4.31, 4.40, 4.41) are the Commission's and because the determination as to the adequacy of the technical exhibits is a matter peculiarly within the Commission's expertise.

c. Moreover, the Supply System cannot seriously contend that the license application filed March 31, 1958 was incomplete. The Commission's regulations specify what an applicant must submit and provide that an incomplete application shall be rejected (18 C.F.R. 4.31). The Commission accepted the March 31, 1958 application. A comparison of the application (I R. 165-200) with the applicable regulations (18 C.F.R. 4.31, 4.40, 4.41) demonstrates that Pacific Northwest complied with the Commission's regulations in all respects. No claim is made that the regulations are invalid. And it is immaterial that the Commission's staff subsequently requested Pacific Northwest to submit additional information (II R. 712), for such requests are contemplated by the Act (16 U.S.C. 802(c)) and the regulations (18 C.F.R. 4.31), were contemplated by the permit itself (I R. 162-163), and are customary in most cases (II R. 652 n. 31). In short, the Commission was right in concluding that the March 31, 1958 license application was complete.[32]

[32] Among other things, contrary to assertions by the Supply System (Br. p. 59), the March 31, 1958, application included all information later specified by the Commission in its public notice of the license application—

2. The Supply System's principal contention in this connection is that Pacific Northwest did not complete the preliminary investigations contemplated by the Act until 18 months after March 31, 1958. That contention likewise was not raised in a timely fashion before the Commission and in any event is without merit.

a. The Supply System did not make the contention that Pacific Northwest did not complete the work contemplated by the Act until 18 months after filing its license application even in the Supply System's footnote to its exceptions to the examiner's decision. Rather, the issue was raised in the dissenting commissioners' opinion long after the record was closed (II R. 706-707).[33] In consequence, Pacific North-

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the name of applicant, name of project, location, type and height of structure, location of reservoir, storage in reservoir, and initial and ultimate power installations (compare I R. 165-170 with I R. 238-239). Further, the application contained 19 detailed topographical maps of the area involved, made for Pacific Northwest by the Aerial Map Company of Idaho, Inc. (I R. 173-191), incorporated by reference to the Mountain Sheep-Pleasant Valley application 45 other detailed maps covering the balance of the reservoir area (I R. 171), and contained 7 fully developed and detailed engineering designs of the High Mountain Sheep development—commonly called "L" drawings (I R. 192-198). While the "L" drawings were later modified in certain respects, the drawings initially filed were, themselves, fully adequate for Commission action, and a comparison of the original and modified drawings demonstrates that the differences in detail reflect only the sort of changes that normally evolve in the course of a proceeding (compare I R. 192-200 with II R. 226, 229-233).

[33] The memorandum in support of the motion to dismiss the application, filed by the National Hells Canyon Association and the Northwest Public Power Association, did note (IV R. 326) Pacific Northwest's letter of March 11, 1958 (II R. 714), in which Pacific Northwest wrote the Commission that it proposed to study High Mountain Sheep "on a comparative basis with Nez Perce" and that approximately ten months would be required to complete the study. See p. 67, *infra*. However, even if that reference in the motion was intended to raise the question whether Pacific Northwest had completed investigations contemplated by the Act before it filed its High Mountain Sheep license application, the two associations withdrew from the proceedings, and as we have noted (p. 62 n. 31, *supra*), there is nothing in the record to indicate that the Supply System adopted their motion as its own until after the Commission announced its decision (II R. 718).

west's relevant activities prior to March 31, 1958, are not fully developed in the record. Yet, assuming that the extent of Pacific Northwest's investigations can be questioned in the face of a complete license application, the Supply System's contention that those investigations were not complete obviously presents an issue of fact. In these circumstances, the issue should not be considered open now.

b. Moreover, what evidence there is in the record indicates that Pacific Northwest *did* do the work contemplated by the Act before it filed its license application on March 31, 1958. The record shows that Pacific Northwest first undertook site investigations of High Mountain Sheep early in 1957 (I R. 7; see also IV R. 138). Otherwise, the record contains no direct evidence as to Pacific Northwest's activities prior to March 31, 1958. But the record does contain matters from which the nature of Pacific Northwest's activities may be inferred. As we have noted (p. 63 n. 32, *supra*), the application filed on March 31, 1958 included all the information required by the Commission's regulations for an acceptable application; contained all the information included later in the Commission's public notice of the license application; contained 19 detailed topographical maps of the area involved and incorporated by reference to the previous license application 45 other maps covering the balance of the reservoir area; and in addition contained fully developed and detailed engineering designs of the High Mountain Sheep development. Surely substantial work must have been done within the stated term of the permit.

To be sure, pursuant to Section 4.31 of the Commission's regulations, which specifies information which need not be filed until "such time as the Secretary directs" (18 C.F.R. 4.31), Pacific Northwest deferred the filing of certain exhibits which an applicant is required eventually to file

by Section 9 of the Act and by Section 4.41 of the regulations. Pacific Northwest's reasons for deferring the filing of those exhibits are a matter of record (I R. 204-211),[34] but whether Pacific Northwest completed the work necessary to file those exhibits on March 31, 1958 simply is not a matter which was questioned during the hearing on its license application and thus is not a matter which the Supply System may properly question now.

Moreover, the matters on which the Supply System relies to support its claim that Pacific Northwest failed to complete the work contemplated by the Act prior to March 31, 1958, afford no support for that claim. The Supply System premises the contention on the fact that the Commission requested additional information from Pacific Northwest after the application was filed, on the further fact that Pacific Northwest did additional work after the application was filed, and on certain documents which the Supply System implies represent admissions that Pacific Northwest did not complete the work contemplated by the Act prior to filing its license application. However, as we have noted, requests by the Commission for additional information were contemplated by the Act, the regulations, and the permit, and are customary in most cases. See p. 63, *supra*. Additional work after the filing of an application likewise is customary (see *Empire District Electric Co.*, 1 F.P.C. 15 (1932)), and obviously would be done in a case like this, where a protracted contested hearing was in prospect. And the documents on which the Supply System relies do not support the inferences which the Supply System seeks to have this Court draw from them.

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[34] Pacific Northwest deferred the filing of Exhibits H (stream flow utilization), I (loads and resources and related operational characteristics) and N (cost estimates), pending publication of a Corps of Engineers Review Study of the Columbia River System in order to utilize the Corps' system data in its submission and thus to avoid confusion (I R. 171, 204-211).

In the latter connection, the Supply System points out (Br. p. 55) that in Pacific Northwest's petition for rehearing in the Mountain Sheep-Pleasant Valley proceeding, filed February 18, 1958, six weeks before Pacific Northwest filed its license application, Pacific Northwest asked that adequate time be permitted "for such field examination as may be required to develop further information not adequately provided in the present record" (II R. 861). However, there is nothing in that to indicate that Pacific Northwest had not conducted sufficient field investigations to complete a license application. Similarly, the Supply System points out (Br. p. 55) that on March 11, 1958, Pacific Northwest wrote the Commission that it proposed "to study the High Mountain Sheep project on a *comparative basis with Nez Perce*" and that "[a]pproximately ten months will be required to complete such study, depending upon the extent of drilling and engineering that may be necessary" (II R. 714). Again, however, there is nothing in that to indicate that Pacific Northwest had not already studied High Mountain Sheep sufficiently to complete a license application; rather, the quotation shows on its face that Pacific Northwest proposed to develop a comparison with Nez Perce in expectation of contested proceedings. Similarly, the Supply System implies (Br. p. 58) that Pacific Northwest admitted on June 27, 1958, that it had not investigated High Mountain Sheep during the three-year term of its permit by quoting a statement by Pacific Northwest that "[s]tructures below the mouth of the Imnaha River were not earlier investigated because, in the judgment of the applicant, fish passage devices had not been developed which would permit licensing of major structures obstructing runs of anadromous fish" (I R. 213). However, in context, the quotation clearly referred to the period prior to September 7, 1955, when Pacific Northwest filed its Mountain Sheep-Pleasant Valley appli-

cation (I R. 213).[35] Indeed, the record shows, by direct testimony, that Pacific Northwest commenced site investigations of High Mountain Sheep early in 1957 (I R. 7), well within the three-year term of the permit.[36] In sum, not only is the contention that Pacific Northwest failed to do the work contemplated by the Act not properly before the Court, but on the record it is entirely without foundation. Accordingly, the Supply System's claim that Pacific Northwest's priority expired before it completed its license application is insupportable.

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[35] We set out the relevant passage from Pacific Northwest's letter as it appears in the record in full:

> "Under the Preliminary Permit, the applicant has carried out engineering and other investigations of development of the Middle Snake River. The Preliminary Permit described a proposed two dam development consisting of the Mountain Sheep dam and the Pleasant Valley dam, the two developing head to the tailwater of the licensed Hells Canyon project. The applicant made examinations and surveys and proposed plans, specifications and estimates for such development. Applicant filed Application for License for the Mountain Sheep-Pleasant Valley Project on September 7, 1955, which application was denied on January 20, 1958, by the Commission after hearing. The Mountain Sheep dam described in the Preliminary Permit would have been located at Snake River Mile 192.6. The Mountain Sheep dam as located in the Application for License filed by the applicant on September 7, 1955, was located at Snake River Mile 193.0. At the same time applicant was preparing such plans and specifications for said proposed Mountain Sheep-Pleasant Valley Project applicant also invetigated a structure of the approximate height of the one included in the pending application but located above the mouth of the Imnaha River, and applicant made examinations and surveys and prepared plans, specifications and estimates for such development. This alternate High Mountain Sheep was rejected due to geological conditions. Structures below the mouth of the Imnaha River were not earlier investigated because, in the judgment of the applicant, fish passage devices had not been developed which would permit licensing of major structures obstructing runs of anadromous fish. The investigation of High Mountain Sheep Dam and the reason for lack of contemporary investigation at sites below the Imnaha are of record in the hearing held on Application for License for the Mountain Sheep-Pleasant Valley Project" (I R. 213).

[36] The Supply System makes something of a point of the fact (Br. pp. 56-57) that, in addition to the "L" drawings of High Mountain Sheep

Conclusion

The infirmity of petitioner's position is disclosed by the inequity that would be worked by acceptance of that position in this case. Pacific Northwest's original application for a license for Mountain Sheep-Pleasant Valley—as to which its priority was unquestioned—was denied by the Commission on the ground that the Nez Perce site was preferable. If Pacific Northwest had applied for Nez Perce at that time, the Supply System, as the record discloses, would not have opposed the application. Instead, Pacific Northwest adhered to its conviction, which was ultimately shared by the Commission, that a Nez Perce dam would severely impair conservation interests. That triggered the participation of the Supply System as a competing applicant—but not for High Mountain Sheep—only for Nez Perce. When the strength of Pacific Northwest's case became apparent, the Supply System sought to appropriate High Mountain Sheep on the basis of an asserted preference and a denial of Pacific Northwest's priority. As to that priority, the Supply System rests upon the fiction that, had it thought that Pacific Northwest would seek a license for High Mountain Sheep, it would itself have asserted a

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which were included in the application, the application incorporated by reference 29 "L" drawings included in the Mountain Sheep-Pleasant Valley application. Petitioner refers to this "outrageous sham" "as a purported compliance with the regulations" (Br. p. 56). Surely petitioner cannot seriously suggest that the incorporation by reference by Pacific Northwest of unrelated "L" drawings was a canny attempt to fool the Commission into accepting the application as complete. Obviously, the question whether the application was complete depended upon all the material included in the application, which included "L" drawings relating to High Mountain Sheep. Petitioner disparages those "L" drawings by way of a numbers game—there were only 9 of them (2 by the Corps of Engineers) as compared with 29 unrelated drawings from the prior proceeding (Br. 57)—and by asserting that they were "later withdrawn and superseded by new drawings, wholly different" (Br. p. 57). But, as we have already pointed out, the drawings did comply with the requirements for completeness of applications and the subsequent modifications were not significant. See p. 63, n. 32, *supra*.

preference in the permit proceedings. And it claims want of notice even though Pacific Northwest's application for a permit complied with every applicable Commission regulation. We suggest that one may fairly ask what more Pacific Northwest possibly could have done in this case to protect the heavy investment of time and money that it made in its efforts to develop the project "best adapted" for the full development of the resources of the Middle Snake. Pacific Northwest's claim to a priority cannot be rejected, we submit, without completely undermining the statutory pattern respecting priority established by the Congress. Accordingly, we urge that the judgment of the Court of Appeals be affirmed.

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APPENDIX

SERVICE OF NOTICE OF APPLICATION DATED DECEMBER 16, 1954*

Re: Pacific Northwest Power Company Project No. 2173

December 20, 1954

State comm. form letter and copy of notice sent Registered to:

Public Utilities Commission of Idaho, Boise, Idaho
Public Utilities Commissioner of Oregon, Salem, Oregon
Public Service Commission of Washington, Olympia, Washington
Public Service Commission of Utah, Salt Lake City, Utah
Public Service Commission of Nevada, Carson City, Nevada
Board of Railroad Commissioners of Montana, Helena, Mont.
Public Service Commission of Wyoming, Cheyenne, Wyoming

Governor form letter and copy of notice sent Registered to:

Hon. Len B. Jordan, Governor of Idaho, Boise, Idaho
Hon. Arthur B. Langlie, Governor of Washington, Olympia, Wash.
Hon. J. Bracken Lee, Governor of Utah, Salt Lake City, Utah
Hon. Charles H. Russell, Governor of Nevada, Carson City, Nevada
Hon. Paul Patterson, Governor of Oregon, Salem, Oregon
Hon. J. Hugo Aronson, Governor of Montana, Helena, Mont.
Hon. C. J. Rogers, Governor of Wyoming, Cheyenne, Wyoming

Information letter and copy of notice sent to:

Senators—Henry C. Dworshak, Herman Walker, Guy Gordon and Wayne L. Morse
Representatives—Gracie Bowers Pfost and Sam Coon

* Commission Record, pp. 30,008-30,009.

Copy of notice sent to:

W. E. Parrott, Secy., Pacific Northwest Power Co., P.O. Box 1445, Spokane 10, Washington
Stewart N. Brandburg, Nat'l Wildlife Federation, 232 Carrol St., Washington, D.C.
Mr. George H. R. Taylor, 1011 East State St., Boise, Idaho
Mo. [sic] Leighton, Atty., 910 17th St., N.W., Washington 6, D.C. (Appl.)
4—Chief of Engineers
5—Forest Service
Department of Reclamation, State House, Boise, Idaho
Department of Fish and Game, State of Idaho, Boise, Idaho
County Commissioners, Idaho County, Grangeville, Idaho
Hydroelectric Commission of Oregon, Salem, Oregon
Fish Commission of Oregon, 307 State Office Bldg., 1400 S.W. 5th Avenue, Portland 1, Oregon
Oregon State Game Commission, P.O. Box 4136, Portland 8, Oregon
County Court, Wallowa County, Enterprise, Oregon
Columbia Basin Commission, State of Washington, Ephrata, Washington
Division of Water Resources, Dept. of Conservation and Development, State of Washington, Olympia, Washington
Department of Fisheries, State of Washington, 4015 20th Ave., West, Seattle 99, Washington
The Department of Game, State of Washington, 509 Fairview Ave., N., Seattle 9, Washington
Attorney General, State of Washington, 2018 Smith Tower, Seattle, Washington
Miss Inge Kaiser, Room 1015 Cafritz Bldg., Washington 6, D.C.

cc: Regional Office—San Francisco Law and Licensed Projects

ES:mt 12/20/54

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